A PLAINTIFF LAWYER'S GUIDE :

BY KEITH TRONC, BRISBANE

Every summer, injuries to swimmers at Australian beaches are commonplace. Waves are often very powerful, and surfers who find themselves "dumped" by those waves can sustain fractures. Other swimmers are injured by the heads, shoulders and projecting limbs of body surfers riding the waves to shore. Although there are usually no signs proclaiming "Swim at your own risk in the flagged areas", the acceptance of some risk seems to be the generally held Australian philosophy.

Boards - a hazardous extra in an already risky venue?

But should swimmers, (particularly the very old and the very young), in specially designated "flagged" safety areas, under the control of lifeguards employed by the local authority, have to face additional risk of personal injury from out-of-control fibreglass or plastic missiles? The riding of surfcraft of various kinds in flagged areas, often by children who cannot competently handle what becomes, in effect, a sea projectile, has now become commonplace.

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What if a swimmer, who had been persuaded by the beach authority's entreaties to stay safe by swimming between the flags in a patrolled area, is then struck and injured by a child's surfcraft while in that ostensibly protected area? Which party should be sued? It is almost always never worth the powder and shot of seeking damages from the errant child, who is the proverbial "man of straw", disadvantaged by age and lacking in assets. Should the local authority responsible for the beach be sued? Clearly, that party would have the assets to pay damages, but there would still be some initial hurdles to overcome.

This would be a classical case of the problems of sheeting some responsibility to the defendant local authority, for the negligent acts of third party tortfeasors, who are themselves not employees of the local authority, and where no vicarious liability applies. How can the necessary proximity be shown, in order to establish a duty of care on the part of the local authority?

Liability of local authorities for injuries done by third parties

For the general principles attaching to a local authority's liability for injury, arising from the acts and omissions of third parties not in a vicarious relationship with it, the prime authorities are:

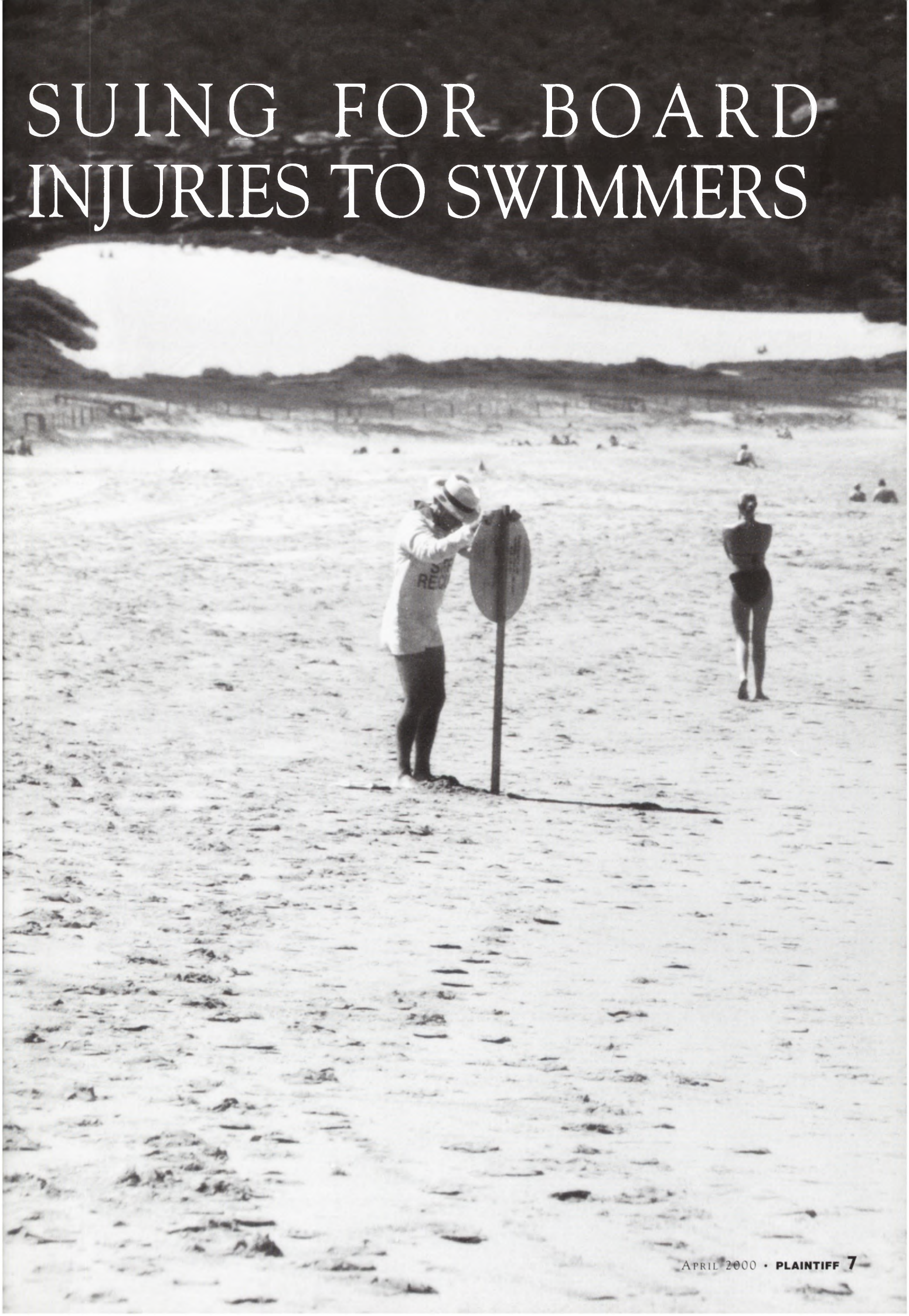
- *Home Office v Dorset Yacht Company Limited* (1970) AC 1004
- *P. Perl (Exporters) Limited v Camden London Borough Council* (1984) 1 QB 342
- *Lamb v Camden London Borough Council* (1981) QB 625
- *Smith v Leurs* (1945) 70 CLR 256.

The two ground rules - control and high foreseeability

Arising from these four authorities are some fundamental principles underlying a local authority's duty of care, or lack of it, for the acts and omissions of non-employed third parties. There is a general rule of common law that a person is usually not liable for the acts of an independent third party. There can be exceptions to the above general rule, when there is a "special relationship" imposing a duty on the defendant to exercise control over the third party who causes the damage. However, there will not be an exception to the general rule, unless there is a high degree of foreseeability that damage will occur as a result of the defendant's act or omission.

In *Home Office v Dorset Yacht Company*, juvenile offenders were working on an island under the control and supervision of correctional officers. During the night, some of the boys escaped from the island and boarded the plaintiff's yacht, moored nearby. The yacht was cast adrift and damaged. The yacht owners brought action against the Home Office as the authority liable for the control and management of the

SUING FOR BOARD INJURIES TO SWIMMERS



"Borstal" correctional centres, alleging negligence on a number of grounds:

1. The warders were aware of the boys' criminal records;
2. There had been previous escapes from "Borstal" institutions;
3. The warders knew that craft such as the plaintiff's yacht were moored offshore; and
4. The warders failed to exercise effective control or supervision over the juvenile offenders.

The Home Office was held liable at first instance, with this judgment affirmed by the English Court of Appeal and then further affirmed by the House of Lords.

Lord Reid held, at 1027:

> "The ground of liability is not responsibility for acts of escaping trainees; it is liable for damage caused by the carelessness of these officers in the knowledge that their carelessness would probably result in the trainees causing damage of this kind."

Lord Morris stated that it did not matter that the damage suffered by the Plaintiff had been caused by third persons, rather than by someone for whom the Home Office was directly responsible, since the acts of those third persons were the very kind of likely occurrence if there was a breach of duty by a servant of the defendant, in this case a failure to properly supervise the boys. Lord Morris placed particular emphasis on the "right to exercise control" over the boys in the care of the correctional centre.

Lord Diplock, in the course of his decision, considered two lines of cases whose characteristics were also apparent in the facts of the *Dorset Yacht* case:

1. Damage had been caused by an act done with conscious volition by a third person responsible in law for his or her own acts.
2. There existed two separate "neighbour type" relationships on the part of the Defendant. The Defendant was in one relationship with the Plaintiff yacht-owner as its "neighbour" and in another relationship with the offending boys as persons under its control.

His Lordship, at 1070, defined the duty of care owed by a Borstal warder, as using reasonable care to prevent a Borstal trainee from escaping custody; a duty owed to persons "whom he could reasonably foresee had property situated in the vicinity of the place of detention of the detainee, which the detainee was likely to steal or to appropriate and damage in the course of eluding immediate pursuit and recapture".

In *P. Perl (Exporters) Limited v Camden London Borough Council* (1984) 1 QB 342, Waller LJ said at 349:

> "... Thus parents may be responsible for the acts of their children, the relationship of Borstal staff to Borstal Boys on an exercise on an island may make the staff responsible, or a football club may be responsible for the actions of spectators whom they have invited to their premises. But no case has been cited to us where a party has been held liable for the acts of a third party when there was no element of control over the third party. While I do not take the view that there can never be such a case, I do take the view that the absence of control must make the court approach the suggestion that there is liability for a third party who was not under the control of the Defendants, with caution."

His Lordship referred to the observations of Oliver LJ, in *Lamb v Camden London Borough Council* (1981) QB 625, who said at 644:

> "There may, for instance, be circumstances in which the Court would require a degree of likelihood amounting almost to inevitability, before it fixes a Defendant with responsibility for the act of a third party over whom he has and can have no control."

Waller LJ at 352:

> "I agree with Oliver LJ that the foreseeability required to impose a liability for the acts of some independent third parties requires a very high degree of foreseeability."

In *Smith v Leurs* (1945) 70 CLR 256, in which it was alleged that the parents of a thirteen year old boy had been negligent in their lack of reasonable supervision in relation to his possession and use of a catapult, Dixon J stated:

> "Apart from vicarious responsibility, one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty ... It is, however, exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature. It appears now to be recognised that it is incumbent upon a parent who maintains control over a young child to take reasonable care to exercise that control as to avoid conduct on his part exposing the person or property of others to unreasonable danger."

Board authority No. 1 – *Glasheen's Case*

Until recently, the best-known authority on the liability of local authorities for injuries by boardriders to swimmers bathing in flagged areas under their control, was the N.S.W. Supreme Court case of *Glasheen v The Council of the Municipality of Waverley* (1990) Aust Torts Reports 81-016.

"Should the local authority responsible for the beach be sued? "

The plaintiff in this case was a 14 year old schoolgirl, who was rendered quadriplegic while riding a plastic foam surfboard within the flagged area of a beach controlled and managed by the defendant council.

Within that flagged area, the riding of hard fibreglass boards was prohibited and it was such a hard-type surfboard which either struck the plaintiff or caused her to fall and strike her head on the seabed. It was the plaintiff's case that the beach inspector had been negligent in not ensuring as far as he could, the safety of people surfing and swimming between the flags, which was agreed in evidence as being the prime responsibility of a beach inspector. The defendant council argued that the allegations against it were policy decisions and matters of public law, thereby preventing a private cause of action. His Honour, Sharpe J, found for the plaintiff, holding:

1. The risk of injury to persons surfing in a flagged area by those using surfboards made of hard material was foreseeable. The defendant's document, "Duties and Responsibilities of Beach Inspector/ Life Guard", clearly disclosed an awareness of the relevant risk.
2. The required relationship of proximity existed between the plaintiff and the defendant. There was an explicit invitation to those not on hardboards to utilise the flagged area.

   The defendant, having been empowered to control the beach, had assumed the responsibility of taking positive steps which included the provision of inspector/lifeguards who were given powers to regulate the behaviour of bathers and users of surfcraft by marking out safe swimming areas, prohibited areas for bathers, and a permanent surfcraft area and by impounding surfcraft found to be in areas outside the specified areas for surfcraft. The object of these activities could only have been to prevent injury to bathers from hard surfcraft.
3. The inspector on the beach at the relevant time was in breach of his duty to the plaintiff in being absent from the flagged area at the time the plaintiff was injured. Had he been there he would have seen the hardboard riders and the accident would probably not have occurred. The defendant was vicariously liable for his breach.

   Given that the defendant's decision to reduce the number of weekday inspectors from three to two just prior to the commencement of the May school holidays was a policy matter, though the decision was difficult to justify, the fact that while one of the two inspectors was at lunch there was only one inspector on the beach obliged the sole inspector to be particularly watchful for board riders outside their specified area and more especially for board riders close to or within the flagged area.

Board authority No. 2 – *Fitzpatrick v Maroochy Shire Council* (unreported, Queensland District Court, Maroochydore, 262/1998, 2 September 1999).

In this recent Queensland case, where, at first glance, there would appear to be an extent of similarity to *Glasheen's* case in many of the basic issues, the plaintiff was nevertheless unsuccessful. His Honour Judge Dodds gave the following reasons for his decision:

"The plaintiff's case was that she was struck by the body board. Body boards are not of a type or construction commonly called surfboards, which are those whose riders typically stand on or attempt to stand on when surfing a wave. These surfboards have a hard, fibreglass skin, invariably have a fin or fins underneath and these days are often pointed at the front. They are heavier than a body board and are banned from flagged areas. A body board is usually used by its rider to lie on, to surf a wave. It is typically smaller and lighter than a surfboard, has no fin and is rounded or squared off at its front. It is constructed of a light material such as coolite or polypropylene and usually covered on the top and sides with a cloth and/or rubber-like material. Many are entirely covered with similar material. Some, however, have a hard, smooth, plastic type sheeting on their bottom surface to improve their performance. Body boards are commonly seen on surf beaches and in flagged swimming areas. The "performance" type of body board is more expensive and usually used by experienced surfers. There are many different types of body boards. The body ▶

board that struck the plaintiff, according to the plaintiff's son, had a smooth, hard bottom surface that curled up over the front of it.

The defendant called evidence from two witnesses, a lifeguard Heath Collie, who was on duty at the flagged area on Maroochydore beach at the time the plaintiff was injured, and Haydn Kenny, who at the time was employed by the defendant as the supervisor of its employed lifeguards within its local authority area. Collie was a relatively experienced lifeguard at the time. Kenny had extensive experience of surf life saving and surfing. Both gave evidence that the use of body boards, whether the cheaper type, or the "performance" type, was permitted within the flagged bathing areas in the shire. They were not considered to be dangerous, because they had no significant hard or sharp parts likely to make contact with other swimmers.

"...to impose a liability for the acts of some independent third parties requires a very high degree of foreseeability."

... I find on the balance of probabilities that the board being used by the child was the "performance" type of body board.

Implicit in the defence evidence was a view that body boards posed no more risk of injury to other swimmers than a body surfer. I accept this provided a body board's construction does not contribute significantly to the mass involved if a user being propelled by a wave collides with another swimmer and provided there are no hard surfaces of the board which are likely to come into contact with the swimmer collided with. In speaking of hard surfaces in this context, I am not so much speaking of a broad area of surface, rather a surface where the force is concentrated, such as the edge of a board.

Considerable effort is put into encouraging people intending to swim in the surf to swim within flagged areas which are selected by experienced lifeguards as being the least dangerous areas and where lifeguards are on duty with equipment to assist people who get into difficulties or are injured. The defendant conceded that having set aside flagged areas for surfers who are encouraged to swim in these areas, its duty was to take reasonable care and adopt reasonable precautions to avoid foreseeable injury to them.

"There is no doubt that a public authority may be liable for the negligent acts of its servants or agents in carrying out their duties or exercising their powers within the operational area, although if the performance of their duties or the exercise of their powers involves the exercise of a discretion, an act will not be negligent if it was done in good faith in the exercise of and within the limits of the discretion." *The Council of Southerland v Heyman & Anor* (1984-5) 157 CLR 424 per Gibbs CJ.

Pursuant to its by-laws the defendant had power through its lifeguards to control activity within these flagged areas. It may prohibit the use of particular bathing appliances in the flagged area. Its lifeguard may order a person to stop using a body board that in his or her opinion could cause inconvenience or dangers to bathers, by-law 5(c); or may set aside some other area for the use of persons using boards of some kind to surf on, by-law 5(f). There is power to seize and detain items such a board being used in contravention of the by-laws, by-law 8.

There are pitfalls in all sorts of activity in every day life that may result in injury. Swimming in the surf in a flagged area will considerably reduce the risk of drowning. It will, however, often introduce the risk of collision with other swimmers who may be moving in a relatively uncontrolled manner due to wave action. The inevitable crowding of people within the flagged areas raises an obvious risk of collisions occurring between people being moved about by the force of the water from breaking or broken waves. The risk will increase as the number of swimmers in a particular area and/or the extent of the wave action increases. Persons body surfing on waves impose an obvious risk of collision. The extent of a flagged area is in large part constrained by beach conditions.

As Sharp J said in *Glasheen v The Council of the Municipality of Waverley* (1990) ATR 81-016, an action arising out of injury caused by a surfboard rider in a flagged area, "it is trite to say that the council's duty is to exercise reasonable care to prevent foreseeable damage: it is not to insure every member of the public using their facilities against risk of injury" at 67,717.

"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." *Wyong Shire Council v Shirt* (1980) 146 CLR 41 at 47-8 per Mason J.

A possible step available to the defendant to reduce the risk of collision between riders of body boards and other swimmers could be to prohibit the use of body boards, particularly the "performance" type board in the flagged areas for swimmers and to remove them if they trespassed. The power to do this is provided in the bathing by-laws. However, unless a separate flagged and patrolled area was selected and set aside for body boarders, they may enter the water where assistance may not be readily available if they experienced difficulties or were injured. Many users of these body boards may be children. Kenny said

the question of a separate flagged area for body boarders had been considered in the past and not proceeded with. There was no further evidence about this in the plaintiff's case. It would no doubt involve extra expense. Another possible step may be to introduce some system of inspection of all body boards being used in a flagged area. This would seem to present problems of supervision and enforcement in crowded swimming areas."

The judgment appears to centre upon an acceptance of the reasonableness of common practice, whereby beach authorities usually allow body board riders to share the flagged surfing areas with swimmers, in the face of practical difficulties in setting aside separate areas for body board riders additional to those designated for surfboard riders, and the additional expense of checking the safety of all body boards, before allowing the riders entry into the swimming area. The foreseeability of injury to swimmers is acknowledged as a general one, with all surfing activities seen as being inherently hazardous, with or without the adjacent presence of surfboards.

"A swimmer was struck in the neck by a surfboard, while swimming at a beach controlled by the council."

Board authority No. 3 - *Bloom's Case*

As in *Glasheen's* case, above, the Council of the Municipality of Waverley was again the defendant. In a majority judgment (Mason P and Sheller JA, with Powell JA dissenting), the N.S.W. Court of Appeal held that the defendant council was liable in negligence because of the injury perpetrated by a surfboard rider in among the swimmers in a flagged surfing area. (See *Bloom v Council of the Municipality of Waverley* (1999) Aust. Torts Reports 81-517.)

A swimmer was struck in the neck by a surfboard, while swimming at a beach controlled by the council. After being injured, he collapsed on the beach and remained there for 15 minutes before speaking with the only person on beach patrol - a 13-year-old boy.

It was held that the type of accident which had occurred was avoidable, through the exercise of reasonable care. The council chose to open the beach to swimmers, at the time of the accident. There was a system in place designed to protect swimmers from a perceived risk and a known danger, and the risk of an accident from the presence of surfboard riders was a clearly foreseeable one. Neither of the two beach inspectors on the beach was keeping a look-out at the time the respondent was injured. If they had been, the accident would probably not have occurred. The failure to have beach inspectors on duty materially contributed to the accident.

Postscript

Following wide newspaper publicity of the "surfing granny" case (see Board Authority No. 2 earlier - Mrs Fitzpatrick, the plaintiff swimmer injured by a bodyboard while she was between the flags at Maroochydore, was a 75 year old grandmother), the Surf Life Saving (Queensland) organisation decided that from February 2000, bodyboard riders would be segregated from swimmers on the state's beaches.

> "Spokesman George Hill said: 'There has been a boom in boogie boards and unfortunately this has resulted in more collisions, litigation and threats of law suits.
> 'It's still to be passed at a national level but we would like to see two patrolled areas, one for swimmers and one for boogie board riders. By separating them we can keep them away from the swimmers and still keep an eye on them if something goes wrong."

(Sunday Mail *19/12/1999*) PL