ANNE MATTHEW, QLD

The responsible plaintiff:

Buttita v Strathfield Municipal Council (Unreported, 8 October 2001, Supreme Court of New South Wales, Court of Appeal)

Public liability cases almost invariably focus on the duty of the defendant. However one of the most pivotal issues in public liability is the extent to which plaintiffs should take responsibility for their own safety. A recent decision of the New South Wales Court of Appeal offers a good indication of the court's attitude toward plaintiffs.

In *Buttita v Strathfield Municipal Council*,[1] the plaintiff had slipped, fallen and broken his ankle while playing golf on a course owned and operated by the defendant. The weather was fine but the course was wet from overnight rain. The plaintiff claimed that the defendant had been negligent as it had failed in its duty to make the course as safe as reasonable care could make it for the purposes of playing golf. It was submitted that the duty of the defendant necessitated the signposting, barricading, reconstruction or reconfiguration of the wet slope upon which the plaintiff slipped.

In the Court of Appeal, Giles JA, with whom Spigelman CJ and Fitzgerald AJA agreed,[2] was satisfied that the defendant had not breached its duty of care. His Honour offered the following reasons:

'Golf courses are not nurseries. They have grass, dirt and slopes, and because golfers brave the weather the grass, dirt and slopes may be slippery during and after rain . . . It is obvious to golfers as an ordinary incident of their golfing life that a slope such as that on the back of the sixteenth green, even on the appellant's case is not dangerous when dry, may be slippery during and after rain.'[3]

Giles JA considered that the plaintiff could easily have avoided the slope upon which he slipped and fell by walking around the slope rather than down it.[4] Further, it was not necessary for an occupier such as the defendant to 'guard against any and every foreseeable risk, or against the risk arising from an entrant deliberately behaving in a foolhardy manner'.[5] His Honour considered that all that could be expected of the defendant was to respond reasonably to the foreseeable risk.[6] On the other hand, when considering what was required of the plaintiff it was necessary to take into account that the plaintiff had been injured while engaged in a sporting activity. His Honour referred to the High Court's recent decision in *Agar v Hyde*[7] where Gaudron, McHugh, Gummow and Hayne JJ in their joint judgment noted that when adults participate in sport, they generally make the decision to do so freely and voluntarily.[8] Their Honours considered that while that of itself does not diminish or negate the existence of the defendant's duty of care, autonomy comes with certain responsibility.[9] In the present case Giles JA agreed: 'Participation in sport involves an appreciation of the risks of that participation'.[10] Here that would have involved 'an appreciation of the risks of negotiating wet slopes on a golf course'.[11]

The appeal was dismissed with costs in favour of the golf course operator. The plaintiff should have acted with more regard for his own safety. The clear indication from the Court of Appeal is that plaintiffs are required to display some self-responsibility. It appears then that a plaintiff who has not taken simple and reasonable steps to care for his or her own safety cannot expect the sympathy of the court. Calls for the abolition of rights of action or the introduction of statutory regimes of similar effect seem less necessary given the stance taken by the Court of Appeal in this case. Perhaps the attitude of the Court is best demonstrated by Giles JA where he recounts, with favour, a statement by Mason P in an earlier decision of the Court of Appeal:

'In some circumstances the danger is so obvious that, when coupled with the likelihood that persons will exercise reasonable care for their own safety, the duty is satisfied by letting the plainly obvious speak for itself.'[12] PL

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Footnotes:

1 [2001] NSWCA 365.
2 Ibid at [14] and [15].
3 Ibid at [6].
4 Ibid at [[10].
5 Ibid at [11].
6 Ibid at [11] citing *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431.
7 (2000) 201 CLR 552.
8 (2000) 173 ALR 665 at 687.
9 Id. See also Gleeson CJ at 669.
10 Buttita v Strathfield Municipal Council [2001] NSWCA 365 per Giles JA at [11] citing *Agar v Hyde* (2000) 173 ALR 665. See particularly Gaudron, McHugh, Gummow & Hayne JJ at 687 and Gleeson CJ at 669.
11 Ibid at [11].
12 Ibid at [11] citing Mason P in *Franklins Self Serve Pty Ltd v Bozinovska* (unreported, 14 October 1998, New South Wales, Supreme Court of New South Wales, Court of Appeal) at [6]. Mason P made these comments in the context of a consideration of the High Court's decision in *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431.

MICHAL HORVATH, QLD

No repeat warning duty in helicopter crash:

Northern Riverina Council v Petts (Unreported, NSW Court of Appeal – CA 40019 of 2001 – Judgment 4 October 2001)

On 23 October 1990, a helicopter hit a power line and exploded, killing the passenger and seriously wounding the pilot.

Until that day, Stephen Petts was a chief pilot with his employer, Masling Rotor Wing Pty Ltd, a company contracted to do aerial surveys of power lines for the Northern Riverina County Council.

The flights were carried out by a pilot and an observer to direct the pilot to the various locations. The observer, McDonald, was supplied by the council.

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Quade was the owner of property where the helicopter had landed on several days preceding the accident. He also worked for the council. He was to be trained as an observer. The accident occurred early in the morning as the sun was rising. Petts and McDonald arrived at the property. While McDonald ducked inside the house to make a call, Petts started the helicopter and took Quade with him for a 'test' run. This was to test the would-be observer, not the helicopter. Quade had never been in a helicopter before.

The luckless pilot did everything wrong that day. He only raised the helicopter about five metres off the ground; he did not survey the area; he headed straight for the tree line and into the sun.

McDonald ran out of the house yelling for the pilot to raise the helicopter.

After traveling about 350 metres, while still about five metres above the ground, the helicopter hit a single power line and exploded. It rose sharply just before the impact, suggesting that the pilot noticed the power line at the last minute.

There was no evidence of who owned the power line. There was evidence that it supplied power to the local showground. Incidentally, this was not one of the power lines to be surveyed.

Neither McDonald, nor Quade, warned the pilot about the power line on the day of the accident. McDonald gave evidence that a couple of days earlier, while approaching the farm for the first time, he pointed out the power line to the pilot.

The plaintiff did not make it to trial. He issued proceedings and committed suicide shortly after. There was no dis- ▶