



HIGH COURT OF AUSTRALIA

Public Information Officer

9 February 2005

GUY EDWARD SWAIN v WAVERLEY MUNICIPAL COUNCIL

The High Court of Australia today upheld a damages award to Mr Swain who became a quadriplegic in an accident at Bondi Beach in November 1997.

Mr Swain, then 24, was at the beach with his friend Kathryn Galvin and her flatmate Earl Wilson. He waded out about 15 metres into waist-deep water and dived through a wave but hit his head on a sandbar. Mr Swain sued Waverley Council for negligence, alleging that the red-and-yellow flags induced him to swim where he did and that the Council had failed to take reasonable care in positioning the flags and in not erecting signs warning swimmers of the sandbar. The case was heard by Acting Justice Ken Taylor and a four-member jury in the New South Wales Supreme Court. Justice Taylor instructed the jury that the Council had a duty to take reasonable care for the safety of people using the beach. It was for the jury to decide whether there had been a breach of that duty. The jury found the Council liable and found contributory negligence of 25 per cent on the part of Mr Swain. He was awarded \$3.75 million.

The Council successfully appealed to the NSW Court of Appeal on two issues. The Court of Appeal unanimously accepted there was no evidence to support the decision against the Council for failing to warn swimmers of the sandbar and by a 2-1 majority accepted that there was no evidence to support the verdict on the flag placement issue. Mr Swain appealed to the High Court on this latter issue.

The Court allowed the appeal by a 3-2 majority. It held that the Court of Appeal had erred in setting aside the jury verdict. The High Court majority held that there was sufficient evidence on which a jury could be reasonably satisfied that the Council had been negligent. It was open to the jury to accept Mr Swain's version of how he was injured. It was also open to the jury to conclude that in placing the flags the Council should have exercised reasonable care to prevent injury to bathers. Whether or not the risk posed by the sandbar was obvious was a question of fact and it was open to the jury to conclude that the sandbar was a concealed hazard. The flags were not moved on the day of Mr Swain's accident. The Council called no evidence to explain why the flags could not have been moved so as to avoid the hazard. The majority held there was sufficient material to sustain a finding in favour of Mr Swain on the issue of negligence and that, since it was for the jury to decide whether such a finding should be made, the verdict should stand. The majority pointed out that the case, properly analysed, was one concerned with the correct approach by appeal courts to overturning jury verdicts rather than the liability of local government authorities to surfers as such.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*