



## HIGH COURT OF AUSTRALIA

Public Information Officer

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ERNEST VAIRY v WYONG SHIRE COUNCIL:  
GARRY SEAN MULLIGAN v COFFS HARBOUR CITY COUNCIL, STATE OF NEW  
SOUTH WALES, COFFS HARBOUR JETTY FORESHORE RESERVE TRUST AND WAL  
HAMBLEY

Two men seriously injured in separate water recreation activities were unable to recover damages for their injuries, the High Court of Australia held today.

Mr Vairy, now 46, became a tetraplegic when he dived off a rock platform at Soldiers Beach on 24 January 1993 during an outing with his sister's family. Other people were jumping and diving off the rocks and Mr Vairy decided to do the same. He frequently swam, snorkelled and fished at Soldiers Beach but had never dived off the rocks. Mr Vairy could not see the seabed and did nothing to assess the water's depth before diving. He sued the Wyong Council in the NSW Supreme Court, claiming the council was negligent by failing to erect signs prohibiting diving. Mr Vairy said he had hit his head on the seabed but the council said a collision with another person was more likely. Justice Virginia Bell held that he had struck his head on the ocean floor and that such a risk was foreseeable while signs banning or warning against diving were inexpensive. In 1978, another diver had struck his head on the ocean floor in the same spot and become a tetraplegic. Lifesavers often warned people not to dive from the platform but were often rudely rebuffed. Justice Bell awarded damages for the council's negligence, but reduced them by 25 per cent for Mr Vairy's contributory negligence to \$5,054,753.25. The Court of Appeal, by majority, allowed the council's appeal. Mr Vairy appealed to the High Court.

Mr Mulligan, now 36, from Ireland, was in Australia on holiday with his girlfriend when he was rendered a quadriplegic while diving in Coffs Creek at Park Beach near Coffs Harbour on 24 January 1999. The creek had been altered to create a pool of sheltered water for swimming. Rock retaining walls created a fast-flowing channel into the pool. People regularly jumped and dived into the channel to be carried along by the water to the beach. Several times Mr Mulligan waded out into the water until the level of the creek bed fell, made a shallow dive and rode the water to the beach. He then struck his head on an elevated part of the creek bed. Mr Mulligan unsuccessfully sued the respondents for negligence for a lack of warning signs. The Court of Appeal unanimously dismissed an appeal and he appealed to the High Court. The appeals by Mr Mulligan and Mr Vairy were heard together in both the Court of Appeal and the High Court.

The High Court dismissed both appeals, the appeal by Mr Vairy by a 4-3 majority, and the appeal by Mr Mulligan unanimously. In respect of Mr Vairy's appeal, it held that Wyong Council's duty of care did not include erecting signs warning against or prohibiting diving at Soldiers Beach, just one beach on the council's 27km of coastline. Seawaters carry inherent risks and an experienced adult could be assumed to appreciate the risks of diving into the sea from a rock platform. In respect of Mr Mulligan's appeal, the Court also held that Coffs Harbour Council's duty of care did not extend to posting warning signs at Coffs Creek when the danger of diving into water of variable depth exists at most beaches and most waterways.

- *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.*