SUPREME COURT OF QUEENSLAND

CITATION:	*Lennon v Gympie Motel (BN 3451616)* [2016] QSC 315
PARTIES:	**Karla Lucy-May Lennon** (Plaintiff) **v** **Gympie Motel (BN 3451616)** (Defendant)
FILE NO/S:	SC No 3797 of 2006
DIVISION:	Supreme Court – Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	11, 12 and 13 October 2016
JUDGE:	Flanagan J
ORDER:	**The liability of the defendant to pay the plaintiff damages should be apportioned as to 85 per cent against the defendant and 15 per cent against the plaintiff. I will hear the parties as to costs.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS OR DUTIES – OCCUPIERS – where the plaintiff was injured at a pool on the defendant's premises – where the plaintiff was twelve years and nine months of age at the time of the injury – where there was a sign at the pool requiring adult supervision of children using the pool – where there were no signs prohibiting diving or indicating the depth of the pool – whether the failure to display signs prohibiting diving and/or indicating the depth of the pool was a breach of the duty, owed by the defendant, to the plaintiff – whether the failure to display signs prohibiting diving and/or indicating the depth of the pool was causative of the plaintiff's injury – whether the plaintiff was contributorily negligent *Central Goldfields Shire v Haley* (2009) 24 VR 378, cited *Felhaber v Rockhampton City Council* [2011] QSC 23, cited *Hornberg v Horrobin & Anor* [1997] QSC 207, distinguished *Inverell Municipal Council v Pennington & Anor* (1993) 82 LGERA 268, considered *McHale v Watson* (1966) 115 CLR 199; [1966] HCA 13, cited *Miller v Livingston Shire Council* [2003] QCA 29, cited

Mulligan v Coffs Harbour City Council (2005) 223 CLR 486; [2005] HCA 63, cited
Public Trustee v Sutherland Shire Council (1992) 75 LGRA 278, considered
Nagle v Rottnest Island Authority (1993) 177 CLR 423; [1993] HCA 76, cited
Simpson v Grundy [2013] 2 Qd R 384, considered
Thomas v Trades & Labour Hire Pty Ltd (in liq) & Anor [2016] QCA 332, cited
Vairy v Wyong Shire Council (2005) 223 CLR 422; [2005] HCA 62, considered
Roads & Traffic Authority of NSW v Dederer (1970) 123 CLR 185; [1970] HCA 28, considered

COUNSEL: G R Mullins with S J Cilento for the plaintiff
S C Williams QC with M P Williams for the defendant

SOLICITORS: Rostron Carlyle for the plaintiff
Mills Oakley for the defendant

Introduction

[1] This case concerns injuries, suffered by the plaintiff, on 21 February 1998 at a pool located at the Gympie Motel. The plaintiff was rendered tetraplegic as a result of the events which occurred on that day. By orders dated 6 May 2016 Atkinson J directed, pursuant to rule 483 of the *Uniform Civil Procedure Rules* 1999 (Qld), that the determination of the liability of the defendant to pay the plaintiff damages be determined separately from and before determination of the quantum of the plaintiff's damages.

[2] The defendant was the registered business name of Warwick Joseph Phillips, Beverley Jean Phillips, John Edmund Perrett and Marcelline Ellen Perrett who owned the Gympie Motel located at 83 River Road, Gympie in the State of Queensland.[1]

[3] On 21 February 1998 the motel was operated by Mr Phillips (now deceased) and Mrs Phillips.[2]

[4] For reasons set out below, the liability of the defendant to pay the plaintiff damages should be apportioned as to 85 per cent against the defendant and 15 per cent against the plaintiff.

The Case

1 Second Further Amended Statement of Claim, [1.1].
2 Further Amended Defence, [1].

[5] At the time of the incident the plaintiff was approximately 12 years and 9 months of age, having been born on 18 May 1985. The plaintiff was tall and solid in stature.[3] She was 173cm tall and weighed approximately 80 kilograms.

[6] The plaintiff, together with her mother, older brother Isaac and younger sister Letitia, was travelling to Bundaberg from Brisbane on 21 February 1998. Their car overheated during the journey and the plaintiff's mother parked the vehicle at a garage in Gympie. After speaking to the RACQ representative the plaintiff's mother decided to stay in Gympie overnight, at the Gympie Motel.[4] The family had never previously stayed at this motel.

[7] The plaintiff, with her mother, brother and sister, arrived at the Gympie Motel at approximately 4:30pm.[5]

[8] The swimming pool at the motel was an in-ground pool. Its dimensions were approximately 10 metres by 5.2 metres, with an internal width of 4.5 metres. It had a raised edge of 130 to 150mm above the surrounding concrete area with coping of approximately 30cm width. The coping was filled with standard nosing and tiles, interspersed with randomly shaped ceramic tiles.[6] The pool was enclosed within fencing and accessible only via a locked gateway.[7] The body of the pool was rectangular in shape and its depth gradually increased from approximately 0.9 metres at one end to 1.74 metres at the opposite end. There were entry stairs into the pool at the shallow end.[8] There was a sign on the only gate to the pool enclosure. The sign read:[9]

> *"Pool Rules*
>
> *All children must be under adult supervision at all times, in pool area. Keys in office. Hours 6AM – 10PM"*

[9] The defendant admits that it encouraged guests to use the swimming pool for recreational purposes and it knew that child guests regularly used the pool for that purpose.[10]

[10] Annexed to the shallow end of the pool was a jacuzzi area.[11] The floor of the pool was covered in small featureless tiles.

[11] There were no depth markers or signs or pictographs prohibiting diving around the pool.

[12] The plaintiff contends that she was rendered tetraplegic when she struck her head in the pool.[12]

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3 T1-37, lines 34-40.
4 T1-87, lines 22 to 46; T1-88, lines 1 to 12.
5 T1-88, lines 11 to 12.
6 Report of Mr McDougall, Exhibit 3, page 3.
7 Further Amended Defence, [1(b)(i)].
8 Report of Mr McDougall, Exhibit 3.
9 T1-89, lines 8 to 11; Exhibit 1(c); Exhibit 26, para 13.
10 Second Further Amended Statement of Claim [1.3] and [1.5]; Further Amended Defence [1(c)] and [1(d)(i)].
11 Exhibit 10. The area marked "J" on exhibit 10 is the jacuzzi area. The marking was made by the plaintiff's witness Letitia Lennon in the course of her evidence in chief T1-54, lines 9-10.
12 Plaintiff's Outline of Argument at Trial, [1].

[13] The plaintiff and the defendant offer differing scenarios as to how the plaintiff sustained her injuries.[13]

[14] The plaintiff's case, in general terms, is that if the defendant had erected signage, warning users of the pool as to either the depth of the pool or that diving was prohibited, or both, the plaintiff would not have dived into the pool and the accident would not have occurred.[14]

[15] The defendant's case is that:

(a) there is insufficient evidence for the Court to find on the balance of probabilities how the plaintiff's injuries occurred;

(b) no breach of duty occurred as the foreseeability of any risks of injury was adequately addressed by the sign requiring adult supervision and in any event such risks (including the risk of the plaintiff diving into the pool) were obvious;

(c) even if there was a sign warning users of the pool about either the depth of the pool or that diving was prohibited, the plaintiff would still have dived into the pool; and

(d) the plaintiff, in any event, contributed to her own injuries.

[16] As the plaintiff's injuries occurred on 21 February 1998, the *Civil Liability Act 2003* (Qld) does not apply and the case is to be determined according to common law principles.[15]

[17] The issues for determination are:

1. Is it more probable than not that the plaintiff's injuries occurred as a result of her diving into the pool? (The mechanics of the injuries).

2. Does the content of the defendant's duty of care extend to taking steps to reduce the risks of injury, by having depth markers in place and/or erecting a sign warning that diving was prohibited? (Breach of duty).

3. Would the plaintiff's injuries have been avoided had any of the steps in paragraph 2 been taken? (Causation)

4. If the defendant did breach its duty of care and the plaintiff's injuries were caused by that breach, was the plaintiff contributorily negligent?

The Plaintiff's Evidence

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[13] Plaintiff's Outline of Argument at Trial, [33] to [44]; Defendant's Submissions, [1(n)] and [1(o)].
[14] Plaintiff's Outline of Argument at Trial, [3] to [4].
[15] See s 4 of the *Civil Liability Act* 2003 (Qld).

[18] The plaintiff has no recollection of the events of 21 February 1998.[16] Her recollection of events prior to the incident is limited in that she appears able to recall some events very clearly, but is unable to recall other events at all.[17]

[19] A particularly striking example of the plaintiff's inability to recall certain events prior to 21 February 1998 emerged in the course of cross-examination where the plaintiff stated that she could not remember an occasion where she had dived prior to 21 February 1998.[18] The plaintiff stated that she could not remember ever having dived into a pool.[19]

The Plaintiff's Memory

[20] Dr Steven Costello, who was employed at the Gympie General Hospital in February 1998,[20] signed the plaintiff's patient discharge form.[21] The patient discharge form states that:

> *"A diagnosis of hypoxic brain injury secondary to immersion due to a cervical spine injury with aspiration pneumonia was made."*

[21] Dr Costello gave evidence that short-term and long-term memory and behavioural issues may be included in the constellation of symptoms that can arise from a hypoxic brain injury.[22]

[22] Dr Costello noted that the presence of a hypoxic brain injury is not necessarily consistent with hypoxic brain damage having occurred.[23] According to Dr Costello, the existence of a hypoxic brain injury can only be determined prospectively. The effect of his evidence is that the symptoms flowing from a hypoxic brain injury can only be determined after the fact, through multiple tests.[24]

[23] There is no evidence before me, aside from the patient discharge form detailing the existence of a hypoxic brain injury and the plaintiff's testimony, to suggest that her memory was impaired as a result of the incident on 21 February 1998.

[24] In explaining her memory difficulties the plaintiff stated that she has problems with short term recall.[25] As well as this there are parts of her childhood, prior to the incident, which she cannot recall at all.[26] She can however, recall specific things that she used to do in her childhood.[27]

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16 T1-29, lines 14 to 16.
17 T1-41, lines 5 to 12.
18 T1-39, lines 33 to 35.
19 T1-39, lines 43 to 44.
20 T2-38, line 47.
21 Exhibit 18.
22 T2-39, lines 30-35.
23 T2-40, lines 7 to 11.
24 T2-40, lines 22 to 33.
25 T1-49, lines 21 to 29.
26 T1-50, lines 3 to 6.
27 T1-50, lines 4 to 6.

[25] Given the significant amount of time that has passed since the incident occurred it is not surprising that the plaintiff is unable to recall some events prior to 21 February 1998.

[26] As is discussed below, there are numerous pieces of evidence suggesting that the plaintiff had in fact dived into pools prior to 21 February 1998. Whilst I do not regard this inconsistency as rendering the plaintiff an unreliable witness, it does require the Court to approach her evidence with some caution.

[27] I consider that the plaintiff's evidence as to being unable to recall ever having dived into a pool prior to 21 February 1998 is characteristic of an effort to downplay her previous experiences diving into pools.

The Plaintiff's Life Prior to 21 February 1998

[28] The plaintiff attended a number of different schools for years one to seven of her schooling. At the time of the incident she was in year eight at Cleveland State High School.[28]

[29] In April 1996, whilst a student at Milton State School, the plaintiff received a Principal's Award for "trying hard and showing responsibility and initiative". In May 1997 the plaintiff received a Principal's Award for "trying hard at high jump". In December 1997, whilst still a student at Milton State School, the plaintiff received an Intermediate Life Saving Award.[29]

Travel to Stradbroke Island

[30] The plaintiff gave evidence that she had done a lot of swimming on Stradbroke Island, both in the ocean and in Brown Lake and Blue Lake.[30] She noted that she spent almost every weekend and almost all of her school holidays at Stradbroke Island and had been going there all of her life that she could remember.[31]

[31] In travelling to Stradbroke Island from the mainland, the plaintiff would, with her younger sister Letitia, leave school on the train, catch a bus to Cleveland and take the water taxi to Stradbroke Island.[32] This occurred whilst the plaintiff was in years six and seven at Milton State School.

[32] Letitia Lennon is approximately 6 years younger than the plaintiff.[33] She was six years and eleven months old at the time of the incident on 21 February 1998.[34]

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[28] T1-28, lines 29 to 39.
[29] Exhibit 8; T1-29, lines 7 to 25.
[30] T1-29, lines 34 to 36.
[31] T1-30, lines 4 to 20; T1-31, lines 15 to 23.
[32] T1-30, lines 7 to 10.
[33] T1-32, lines 18 to 20.
[34] T1-51, lines 11 to 17.

[33] The plaintiff's mother, Carol Lennon, gave evidence that the plaintiff would, with Letitia, catch a train from Milton station to Central Station or Roma Street Station, ride a bus from the train station to the water taxi terminal and board a water taxi bound for Stradbroke Island.[35]

[34] Carol Lennon was confident that the plaintiff could manage Letitia on the trip from Milton to Stradbroke Island.[36] The travel to Stradbroke Island occurred every weekend during the school term in 1997.[37]

The plaintiff's work experience prior to 21 February 1998

[35] Carol Lennon owned and operated a second-hand store at Dunwich on Stradbroke Island.[38] On occasions when the plaintiff's mother was not in the shop, the plaintiff would operate the shop and carry out transactions with customers, by herself, for up to three or four hours.[39]

[36] Carol Lennon gave evidence that, mainly on Saturday mornings, the plaintiff would assist in operating the shop by serving customers, cleaning, answering the phone and taking messages as well as performing transactions and writing cheques for her mother to sign.[40]

[37] The plaintiff's father owned, and continues to own, a trucking and logistics business which has operations on Stradbroke Island.

[38] When working for her father the plaintiff travelled with him out to mine sites.[41] The plaintiff stated that she would travel in the truck with her father, take messages and write out cheques.[42]

[39] The plaintiff described that when she travelled to a mine site in the truck with her father, she was mindful of abiding by the rules, including those that required her to stay in the vehicle to avoid the risk of injury to herself or others.[43]

[40] On Friday and Saturday nights, when the plaintiff was on Stradbroke Island, she worked in the kitchen of the little Ship Club collecting dirty dishes and performing basic food preparation tasks.[44]

The plaintiff's supervision of her sister and others

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35 T1-85, lines 42 to 47.
36 T1-86, lines 11 to 12.
37 T1-86, lines 14 to 15.
38 T1-34, lines 1 to 5.
39 T1-34, lines 5 to 21.
40 T1-86, lines 17 to 45.
41 T1-36, lines 22 to 30; T1-87, lines 1 to 3.
42 T1-34, lines 23 to 25.
43 T1-36, lines 20 to 30.
44 T1-34, lines 32 to 36.

[41] When staying on Stradbroke Island, the plaintiff went swimming at the beach with her sister Letitia and Letitia's friend Emily Leben, unaccompanied by adults.[45] Both Irene Leben and the plaintiff's mother corroborated the plaintiff's account of being responsible for her sister Letitia and Emily without adult supervision.[46]

[42] Ms Leben observed that she had always found the plaintiff to be very responsible.[47]

[43] It should be noted that Ms Leben's son died in January 1996 in an aeroplane crash.[48] She considered that, as a result, she may have been a little overprotective of her daughter Emily.[49]

[44] The fact that Ms Leben permitted her daughter Emily to be supervised by the plaintiff in these circumstances supports Ms Leben's evidence that she considered the plaintiff to be responsible.

The Plaintiff's Swimming Experience Prior to 21 February 1998

[45] Evidence was given of the plaintiff's swimming experience prior to 21 February 1998.

[46] According to the plaintiff she swam often when on Stradbroke Island both in the ocean and in Blue Lake and Brown Lake.[50] The plaintiff could not recall signs warning against diving, nor signs relating to conduct, at Blue Lake or Brown Lake.[51]

[47] The plaintiff never dived into Brown Lake.[52] The reason for this was, on the plaintiff's evidence, because the water in the lake had a brown colour such that the bottom of the lake could not be seen except when close to the sides of the lake.[53]

[48] Blue Lake, according to the plaintiff, had a sheer drop from the banks of the lake which meant that the bottom of the lake could not be seen at any point.[54]

[49] There was a rope swing, attached to a tree which the plaintiff used when swimming at the lake.[55] The plaintiff stated that prior to using the rope swing she would check that there was nothing underneath the water because, *"if you landed on a branch or anything, you could get hurt*."[56]

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45 T1-32, lines 22 to 35.
46 T1-81, lines 36 to 44; T1-87, lines 17 to 18.
47 T1-82, lines 30 to 34.
48 T1-81, lines 12 to 13.
49 T1-82, lines 36 to 40.
50 T1-30, lines 22 to 23.
51 T1-31, lines 34 to 35.
52 T1-30, lines 25 to 33; T1-30, lines 39 to 42.
53 T1-30, lines 41 to 42.
54 T1-30, lines 44 to 46, T1-31, lines 7 to 10.
55 T1-31, lines 4 to 13.
56 T1-31, lines 11 to 13. See also T1-31, lines 25 to 32; T1-39, lines 4 to 6.

[50] The plaintiff also gave evidence that when swimming in Brown Lake she would not dive into the shallow water because she knew that she could suffer an injury by hitting her head on the bottom or hitting her arm.[57]

[51] The plaintiff denied ever having dived off the jetty at Dunwich on Stradbroke Island.[58]

[52] A year or two before the incident on 21 February 1998 the plaintiff visited a relative's ski lodge in Mount Buffalo. There was a running creek in front of the lodge in which the plaintiff, with her younger sister, went paddling.[59] Because she had never been there before and given that she didn't know how deep the creek was, as well as having her sister with her, the plaintiff did not dive into the creek.[60]

[53] Whilst the plaintiff confirmed that she had swum in pools before,[61] she could not recall ever having dived into a pool.[62]

[54] In a letter dated 23 September 2016 the plaintiff's solicitors provided to the defendant's solicitors particulars of the evidence that they would seek to call in respect of paragraph 12A of the Amended Statement of Claim. The letter was tendered without objection. Paragraph 12A of the Second Further Amended Statement of Claim states:

> *"12A. Had the defendant placed "No Diving" signs or pictographs at the entrance and in and around the swimming pool so that the signs were clearly visible to the plaintiff and her sister, the plaintiff would not have dived into the pool and sustained the injury."*

[55] The letter states that the plaintiff, *"…knew not to dive into shallow water or pools in which she could not judge the depth…"*.[63]

[56] However, in cross-examination, the plaintiff refused to concede that she knew not to dive into water in an orientation that would cause her head to strike the bottom of a pool, pond, lake or creek.[64] The plaintiff also rejected the suggestion that she had been previously given specific pool safety instructions not to dive.[65] She could not recall having received swimming instruction at Milton State School.[66]

[57] Tracy Balmanno, a physical education teacher, gave evidence that she was a physical education teacher at Milton State School in 1997.[67] Ms Balmanno, in 2004, gave a statement witnessed by the principal of Milton State School relating to the plaintiff.[68] This statement was tendered without objection. In the statement, made on 5 October

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57 T1-30, lines 27 to 33.
58 T1-38, line 25.
59 T1-31, lines 40 to 45.
60 T1-32, lines 1 to 3.
61 T1-39, line 40.
62 T1-39, lines 43 to 44.
63 Exhibit 9.
64 T1-40, lines 41 to 46; T1-41, lines 1 to 4.
65 T1-48, lines 12 to 13.
66 T1-39, lines 8 to 24.
67 T2-42, lines 13 to 14.
68 T2-42, lines 23 to 32; Exhibit 19.

2004, Ms Balmanno recorded her understanding that the plaintiff had participated in swimming classes during 1995 and 1996 before being taught by Ms Balmanno. Ms Balmanno recalled that the plaintiff was an average swimmer when compared with other students in the same year level. She could swim the length of the 25 yard pool without difficulty and she showed no reluctance to participate in the swimming sessions.

[58] According to Ms Balmanno the swimming sessions included, amongst other things, safe entries and exits to and from all depths of water as well as safety in and around the pool.[69] In cross-examination Ms Balmanno stated that she taught diving and that it was part of the curriculum when she last instructed swimming at Milton State School.[70]

[59] The dives taught, at that time, included a racing dive and also a stride-entry type dive, which is a life-saving dive.[71]

[60] Ms Balmanno could not remember having taught diving to students in 1997 but could recall that children were involved in school swimming carnivals at which they dived into the pool.[72]

[61] Whilst not being able to precisely recall the 1997 curriculum, Ms Balmanno accepted that she would have taught students the diving associated with swimming in light of the fact that they dived into the pool during swimming carnivals.[73]

[62] I accept that it is more probable than not that the plaintiff had in fact dived into pools before 21 February 1998 and that she had received instruction on how to do so. She had also been trained in pool safety.

[63] Further, I consider that the letter sent by the plaintiff's solicitors to the defendant's solicitors, sent on the plaintiff's instructions,[74] supports a finding that the plaintiff knew at the relevant time, not to dive into shallow water or pools in which she could not judge the depth.

The Plaintiff's character

[64] Referring to the plaintiff's travel from Milton to Stradbroke Island, and the confidence and faith shown by Ms Leben, counsel for the plaintiff submitted that the she was a responsible child prior to 21 February 1998. [75] Senior Counsel for the defendant sought to paint a very different picture of the plaintiff, prior to the accident.[76]

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69 Exhibit 19, [10].
70 T2-45, lines 17 to 22.
71 T2-45, lines 21 to 22.
72 T2-46, lines 24 to 46.
73 T2-46, lines 44 to 46.
74 T1-45, lines 11 to 12.
75 T1-8, lines 35 to 50; T3-72, lines 25 to 33; Plaintiff's Outline of Argument at Trial, [88] to [94].
76 Defendant's Submissions, [3].

[65] Specifically, the defendant contends that the plaintiff was bad tempered, prone to tantrums, oppositional to her parents, having an aggressive rather than assertive style and as having poor attention unless concentrating on a thing she liked.[77]

[66] The plaintiff refused to accept this characterisation.[78] She did however concede that like any child she probably would, at times, refuse to obey direction from her parents.[79]

[67] The plaintiff repeatedly stated that she would obey a direction where there was a reason for it.[80]

[68] In response to the proposition that even if a no jumping sign had been present at the pool she would have jumped anyway, the plaintiff stated that any such sign would have been there for a reason and that she would therefore have heeded its direction.[81]

[69] Notwithstanding her concession that she would from time to time disobey her parents the plaintiff stated that she would obey a no diving sign because, *"…signs are there for a reason."*[82]

[70] The plaintiff's mother confirmed that if the plaintiff could be provided with a good reason for a direction she would always follow that direction.[83] According to the plaintiff's mother, *"As long as the why was answered properly she was quite happy but she did ask why."*[84]

[71] Notes taken by Dr Ljubisavljevic, a psychiatrist at the Royal Children's Hospital, recording an interview with Carol Lennon on 4 August 1998 were tendered by the defendant.[85] Carol Lennon could not recall this interview.[86]

[72] Dr Ljubisavljevic's notes record the following in relation to Carol Lennon's description of the plaintiff:

> *"Very good social skills. Poor schooling, mostly due to poor attention (no problems concentrating on the things she likes)…*
>
> *Always bad tempered, oppositional. Use [sic] to have tantrums, or later 'to storm out and slam the door'….*
>
> *Excellent verbal skills, that she did not hesitate to use to manipulate people to do her way. 'I'd do anything just to get her off my back' says her mother."*

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77 Defendant's Submissions, [1(b)].
78 T1-45, lines 23 to 46; T1-46, lines 1 to 7.
79 T1-45, lines 34 to 35.
80 T1-47, lines 31 to 46.
81 T1-47, lines 22 to 26.
82 T1-48, lines 9 to 10.
83 T1-99, lines 33 to 38.
84 T1-97, lines 10 to 13.
85 Exhibit 22.
86 T1-97, lines 38 to 46.

[73] Whilst the interview with Dr Ljubisavljevic occurred after 21 February 1998 it is not entirely clear from the notes whether the plaintiff's mother was referring to the plaintiff's character prior to the incident or after the incident. Dr Ljubisavljevic was not called to give evidence at the trial. However, the fact that Dr Ljubisavljevic refers to the plaintiff's behaviour of having tantrums and storming out and slamming the door, in light of the plaintiff's severe injuries and subsequent tetraplegia, necessarily leads to the conclusion that Carol Lennon must have been recalling the plaintiff's character prior to the incident on 21 February 1998.

[74] It is the defendant's submission that the plaintiff's personality, prior to the incident on 12 February 1998, was that of an outgoing person, oppositional to parents, good social skills but with an aggressive style rather than assertive.[87] The defendant tendered a significant body of evidence relating to the plaintiff's personality and demeanour after 21 February 1998 in order to illustrate, *"…a continuum of personality that pre-existed the accident that persisted thereafter."*[88] The plaintiff's conduct in hospital after suffering her injuries included refusing at times to participate with her treatment regime, her refusals to accept the rules in respect of watching television and on two occasions biting staff. This conduct is recorded in hospital records. Carol Lennon sought to explain the circumstances of some of the recorded incidents in a way sympathetic to the plaintiff.[89] This evidence goes to the defendant's submission that, even if a no diving sign or a depth marker or both were present at the pool on 21 February 1998, the defendant would have done exactly what she did. I note immediately the limits on the defendant's submission that evidence relating to the plaintiff's personality and demeanour after the incident on 21 February 1998 is demonstrative of the plaintiff's personality and demeanour prior to the incident. There was, of course, a very significant intervening event in the plaintiff's life being five weeks spent in intensive care as part of ten months' hospitalisation for her injuries.[90] The assertion that the plaintiff's attitude whilst in hospital, after being very seriously injured at a young age, is indicative of her attitude prior to the incident is tendentious. Senior Counsel for the defendant rightly conceded that this submission had limitations.[91]

[75] I will come to deal with this evidence when considering whether the plaintiff would have done what she did had a no diving sign or depth markers, or both, been present at the pool on 21 February 1998. Before doing so, it is necessary to set out the evidence relating to the circumstances of the plaintiff's injury.

The Events of 21 February 1998

[76] After arriving at the Gympie Motel on 21 February 1998, the plaintiff and her sister sought their mother's permission to swim in the pool.[92] Carol Lennon initially told them that as they did not have swimwear they possibly would not be allowed to go swimming.[93] The plaintiff and her sister went to the pool and returned to tell their mother that there

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87 T1-99, lines 24 to 31.
88 T1-100, lines 42 to 46; T1-101, lines 1 to 2l; Exhibit 24.
89 T1-100, line 10 to T1-102, line 20.
90 T1-101, lines 4 to 15.
91 T1-101, line 15.
92 T1-88, line 18.
93 T1-88, lines 22 to 23.

was no signage at the pool save for a sign on the gate requiring adult supervision for children swimming.[94]

[77] Carol Lennon then went from the motel room to the pool with the plaintiff and her sister, noticing a man and people she thought to be a child, in the pool, and a woman on the edge of the pool.[95]

[78] Having reached the pool, Carol Lennon decided that the plaintiff and her sister could swim.[96]

[79] She gave evidence that the presence of at least some adults in the pool influenced her decision. The fact that the plaintiff had been looking after Letitia all day, had looked after her in the past for a number of years and the fact that the plaintiff had recently finished a certificate at school led Carol Lennon to decide that the plaintiff and her sister could swim in the pool.[97]

[80] Before leaving the plaintiff and her sister at the pool Carol Lennon instructed them to be careful of and not disturb other people in the pool, and to behave themselves.[98] In giving this direction Carol Lennon's was concerned to make sure that the plaintiff and her younger sister weren't, *"... jumping or, you know, splashing or upsetting anybody else at the pool."*[99] She did not instruct them not to dive.

[81] Carol Lennon then left the plaintiff and Letitia at the pool, exited the Gympie Motel with her son and walked to a nearby shopping centre to make a phone call. Her recollection is that she had been away for approximately 15 to 20 minutes before returning to the Gympie Motel.[100] Upon her return she saw an ambulance.

[82] Letitia Lennon's recollection of the events of 21 February 1998 is limited. At the time of the events she was approximately seven years old.[101] She could however recall travelling to Bundaberg with her mother, brother and the plaintiff[102] and she could remember going to the motel.[103] After arriving at the motel, Letitia recalled that she asked her mother if she could go swimming. Her evidence was that she had her swimming togs with her, whilst the plaintiff did not.[104] In her evidence-in-chief Letitia stated that she did not see any signs in the pool area,[105] but in cross-examination she accepted that statements from a transcribed conversation with counsel for the plaintiff[106] recorded that she saw, "*...the usual sign like kids must be watched...*"[107]

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94 T1-88, lines 30 to 34.
95 T1-88, lines 40 to 47; T1-89, lines 1 to 4.
96 T1-89, lines 13 to 16.
97 T1-89, lines 16 to 23.
98 T1-90, lines 4 to 6.
99 T1-90, lines 8 to 10.
100 T1-90, lines 21 to 28.
101 T1-51, line 11.
102 T1-51, lines 20 to 21.
103 T1-51, line 33.
104 T1-51, lines 38 to 44; T1-52, lines 36 to 45.
105 T1-53, lines 8 to 9.
106 Exhibit 11.
107 T1-67, lines 10 to 17.

[83] Before entering the pool Letitia received an instruction from her mother, in the presence of the plaintiff, to the effect that the plaintiff was taking care of Letitia, she should listen to the plaintiff and pay attention to the plaintiff. The effect of the instruction was that Letitia should listen to the plaintiff.[108]

[84] Having been at the pool for a period of time, Letitia became aware of other people who were the in the jacuzzi area of the pool.[109]

[85] Letitia recalled that she and the plaintiff were, *"jumping from around the pool, around from everywhere.*"[110] She further recalled:[111]

> *"Not specifically diving. At that age I knew better than to dive straight into a bottom of a pool. So we were jumping out and kind of gliding along, seeing who could get the furtherest. It wasn't a diving competition to see the deepest. But I would referred to it probably as diving, as a young age."*

[86] Letitia indicated that both she and the plaintiff were jumping from everywhere around the pool.[112] In cross-examination Letitia described the activity in the pool was:[113]

> *"Not down, straight, deep, because I was still only young. I wasn't very game to do that. So it was a jump and a glide. I remember jumping and gliding into the pool."*

[87] Letitia also agreed that the entry into the pool, as part of the game with the plaintiff, could be described as a belly-flop. Both Letitia and the plaintiff were engaged in this game where the goal was to see how far they could glide in the pool.[114]

[88] Letitia rejected the suggestion that the plaintiff, in the course of their time in the pool, engaged in a racing dive or doing anything like jumping high in the air or flipping over, any athletic dives or side dives.[115] In the transcript of Letitia's conversation with counsel for the plaintiff, however, Letitia is recorded as having said, *"…we were mostly diving"*[116] and that *"we were having a diving competition"*.[117]

[89] Letitia's evidence in cross-examination, was that a belly-flop was not a dive.[118] At the time she had the conversation with counsel for the plaintiff however, she considered this type of entry into the pool as part of the game with the plaintiff to be properly called a dive.[119]

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[108] T1-53, lines 17 to 24.
[109] T1-53, lines 34 to 37; T1-54, lines 3 to 10.
[110] T1-54, lines 22 to 24.
[111] T1-54, lines 26 to 30.
[112] T1-54, lines 34 to 38.
[113] T1-61, lines 22 to 25.
[114] T1-61, lines 26 to 35.
[115] T1-61, lines 37 to 46; T1-62.
[116] Exhibit 11; T1-68, lines 34 to 41.
[117] Exhibit 11, page 5.
[118] T1-68, line 43.
[119] T1-69, lines 11 to 14; lines 26 to 34.

[90] Letitia also recalled a conversation with one of the people in the jacuzzi area of the pool. At the time of the conversation, she could remember hearing the plaintiff splashing but she did not pay attention to the plaintiff because she was engaged in a conversation.[120] She did not see the plaintiff dive in but *"...could feel the waves hitting the back of me when she like dived in and stuff".*[121] At one point, according to Letitia, the man said, *"...your sister is over there and she's floating..."*[122]

[91] Letitia then turned around and saw the plaintiff floating towards the shallow end of the pool. Her evidence-in-chief initially was to the effect that she saw the plaintiff floating just towards the shallow end of the pool.[123] Ultimately though, Letitia could not recall which way the plaintiff's head was facing.[124]

[92] She responded to the man that the plaintiff did that to scare her sometimes.[125] Letitia's evidence was that the plaintiff had engaged in this type of activity previously, as a joke.[126] She therefore assumed, when she saw the plaintiff floating in the pool that the plaintiff was mucking around.[127]

[93] Letitia's account of events after this conversation with the man is that he exited the pool and she was left by herself in the pool with the plaintiff, who was still floating in the same place.[128] In the transcribed conversation with counsel for the plaintiff, Letitia indicated that the man was leaving just as the plaintiff was lying face-down in the pool.[129]

[94] Letitia swam over to the plaintiff.[130] She did not have her feet on the base of the pool but rather swam over to the plaintiff and tried to drag her, whilst swimming, to the edge of the pool. Letitia could not recall standing in the pool and could not say whether she was in the pool long enough to distinguish the shallow end of the pool from the deep end.[131]

[95] After shaking the plaintiff, Letitia observed that the plaintiff was not reacting in any way to her presence. Letitia then swam under the water, below the plaintiff, and noticed that her eyes were closed and there was what appeared to be snot coming out of her nose and mouth.[132]

[96] Letitia, having observed that the plaintiff was not breathing and not moving,[133] dragged her over to the side of the pool and tried numerous times, unsuccessfully, to pull her out of the pool.[134]

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[120] T1-55, lines 8 to 12.
[121] Exhibit 11, page 6.
[122] T1-55, lines 14 to 18.
[123] T1-55, lines 21 to 22.
[124] T1-58, lines 40 to 42.
[125] T1-55, lines 17 to 18.
[126] T1-55, lines 28 to 31.
[127] T1-55, lines 25 to 26.
[128] T1-55, lines 42 to 44.
[129] T1-68, lines 23 to 25.
[130] T1-63, lines 43 to 45.
[131] T1-63, lines 25 to 32.
[132] T1-56, lines 1 to 14.
[133] T1-56, lines 13 to 14.
[134] T1-56, lines 9 to 14.

[97] I accept that the plaintiff was floating face-down in the pool when observed by Letitia. For Letitia to have to swim under the water to observe the fluid coming out of the plaintiff's mouth and nose, the plaintiff's mouth and nose must have necessarily been under the water. Letitia could not recall the angle of the plaintiff's head to her body.[135]

[98] Letitia then exited the pool, returned to the motel room in which she was staying and attempted to get the plaintiff's asthma puffer.[136] She was unable to open the door and then went to the administration building and sought assistance.[137] A man then ran to the pool to provide assistance. Letitia recalled the paramedics and police attending the motel.[138]

[99] In hospital records it is recorded that three days after the incident Letitia told a social worker words to the effect that the plaintiff dove into the pool and was rendered unconscious when she surfaced.[139] Letitia clarified this statement some years later insisting that she did not actually witness the plaintiff diving.[140] By this I understand Letitia to be saying that she did not see how the plaintiff was injured. Letitia did however witness the plaintiff execute other dives on 21 February 1998:

> *"It was just mainly standing on the edge, standing up and just diving in."*[141]

[100] In cross-examination Letitia sought to explain her previous statements that she and the plaintiff were diving as referring to more of a *"jump and glide"* or a *"belly flop"*.[142] I do not accept this explanation. It is inconsistent with her previous statements that both her and the plaintiff were diving.

[101] John Mulcahy was the man in the pool identified by Letitia Lennon in her evidence. On 21 February 1998 he was in Gympie for a bowls weekend.[143] He arrived at the motel early on the morning of 21 February 1998 and played bowls until some-time in the mid-afternoon.[144] On his return to the motel he decided to go for a swim.

[102] Mr Mulcahy was in the pool when the plaintiff and Letitia arrived. His recollection is that there was another person, an elderly man in the pool at the same time.[145] Mr Mulcahy states that the two girls were not doing anything untoward. They were simply jumping in and out of the pool, swimming and laughing and having a good time.[146] His recollection is that he did not see either of the girls diving.[147]

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[135] T1-56, lines 22 to 24.
[136] T1-56, lines 41 to 45.
[137] T1-56, lines 45 to 47; T1-57, lines 1 to 2.
[138] T1-57, lines 3 to 9.
[139] Exhibit 23, page 673; Plaintiff's Outline of Argument at Trial, [40].
[140] Exhibit 11, page 10.
[141] Exhibit 11, page 10.
[142] T1-61, lines 15 to 35.
[143] T1-71, lines 42 to 43.
[144] T-72, lines 1 to 3.
[145] T1-73, lines 4 to 7.
[146] T1-73, lines 15 to 20.
[147] T1-73, lines 22 to 23.

[103] Mr Mulcahy stayed in the pool for approximately 20 minutes. He has no recollection of speaking to either of the girls. The elderly man left before him so that when Mr Mulcahy left the pool the two girls were by themselves.[148] Mr Mulcahy stayed in the shallow end of the pool whilst the girls were playing in the deep end.[149] Mr Mulcahy had previously been involved with swimming clubs and would have said something if he thought the girls were *"playing around".*[150] He did not observe the girls executing belly-flops or any dives. He did however observe them *"running to the side and jumping".*[151]

[104] I accept Mr Mulcahy's recollection that he did not speak to the girls and left them by themselves in the pool playing. Letitia's reference therefore, to her speaking to an adult male in the pool at the time the plaintiff was injured, is not correct. Further, given that Mr Mulcahy had experience with swimming clubs I cannot accept that he would have left the pool with the plaintiff lying face down in the water.

[105] After Mr Mulcahy left the pool he went back to his room and got changed. He returned to the manager's office at the motel to buy some beer. On his return the manager called out that he required his assistance.[152] He went with the manager to the pool where he saw the plaintiff floating. He jumped into the pool fully clothed and tried to get the plaintiff's head out of the water. The plaintiff was floating face-down.[153] When Mr Mulcahy first observed the plaintiff floating in the water she was approximately in the middle of the pool with her head facing towards the manager's office; that is, towards the shallow end.[154] Having removed the plaintiff from the pool Mr Mulcahy commenced CPR and was successful in resuscitating the plaintiff.[155]

[106] The motel manager, Warwick Phillips, is now deceased. Mr Phillips made a statement dated 22 August 2003, which was tendered.[156] At about 5:00 pm on 21 February 1998 Mr Phillips recalls Letitia coming to the office and saying words to the effect *"my sister is being silly and is keeping her head under the water".* He immediately went out of the reception area to the pool, where he saw the plaintiff lying face-down in the water.[157] The plaintiff was facing the end of the pool closest to the office and lying parallel to River Road, with her feet towards the opposite end, and she was about in the middle of the pool from side-to-side. He recalls a male guest, who got into the pool and helped him support the plaintiff. The ambulance arrived a short time later.

[107] Mr Phillips' daughter-in-law, Kiralee Phillips, was also at the motel on 21 February 1998. Ms Phillips gave evidence. A statement she made on 4 September 2003 was tendered.[158] She recalls using the swimming pool on that day with her husband, Matthew, and their 18-month son Jacob. She recalls two young girls entering the pool. She observed the two girls walk around the side of the pool talking to each other. They did not enter the

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[148] T1-74, lines 4 to 9.
[149] T1-73, lines 25 to 30 and T1-74, lines 10 to 14.
[150] T1-77, lines 9 to 11.
[151] T1-77, line 23.
[152] T1-74, lines 16 to 24.
[153] T1-74, lines 28 to 29.
[154] Exhibit 12; T1-75, lines 16 to 24.
[155] T1-76, lines 5 to 11.
[156] Exhibit 26.
[157] Exhibit 26, [27].
[158] Exhibit 29.

pool or make any motions to enter the pool.[159] Ms Phillips estimated the age of the older girl to be approximately 16. She described the older girl as being tall and mature looking and *"obviously in charge of her little sister"*. Neither girl was wearing swimming apparel. She does not recall either child having a towel.[160]

[108] Ms Phillips must have observed the plaintiff and Letitia when they first came to the pool prior to obtaining their mother's permission to swim. As a storm was approaching the Phillips family exited the pool. When Ms Phillips left the pool the two children were still present but were not swimming. She described the girls as *"just very quiet, just walking around"*.[161] After she changed Ms Phillips was summoned back to the pool by the motel cook. On re-entering the pool she observed her father-in-law with the plaintiff in the pool. She observed another man assisting her father-in-law with the plaintiff. The ambulance arrived soon after.

[109] After the plaintiff was treated by ambulance officers she was transferred to the Gympie Hospital. After her condition was stabilised she was transferred approximately six hours later to the Royal Children's Hospital where she was initially an in-patient in the Intensive Care Unit for approximately five weeks. Her diagnosis included a burst fracture of the fifth cervical vertebra complicated by tetraplegia, aspiration pneumonia and a closed head injury. Her unstable cervical spine fractured was managed by a C4-5 to C6 anterior spinal fusion which was carried out on 24 February 1998.

[110] The plaintiff remained in the Royal Children's Hospital until November 1998 primarily in relation to issues arising from her tetraplegia.

After the Incident

[111] After the accident, the defendant placed a "no diving" sign in the pool area.[162] The sign reads "NO JUMPING", "NO DIVING".

[112] At least one depth marker was also put in place identifying the shallow end of the pool.[163]

The Mechanics of the Plaintiff's Injuries

[113] The plaintiff's pleaded case is that during the course of engaging in activity in and around the pool, the plaintiff entered the pool in a diving formation and struck her head on the bottom or side of the pool.[164] The plaintiff pleads that she intentionally dived into the pool and failed to appreciate the depth of the pool was shallow and thereby struck her head on the bottom or side of the pool.[165] The defendant does not admit these paragraphs on the basis that the allegations are untrue, not the reasonable or proper inferences from the known facts, and are speculative and unsupported. Further there is no evidence

[159] T3-19, lines 26 to 30.
[160] T3-19, lines 36 to 47; T3-20, lines 5 to 6.
[161] T3-20, lines 31 to 32.
[162] Exhibit 1, photograph "X" and Exhibit 3.
[163] Exhibit 1, photograph "X" and Exhibit 3.
[164] Second Further Amended Statement of Claim, [8].
[165] Second Further Amended Statement of Claim, [9] and [10].

available to the parties to establish, on the balance of probabilities, the truth of such allegations.[166]

[114] The plaintiff bears the onus of proving, on the balance of probabilities, that the injuries sustained by her were as a consequence of diving into the pool and striking her head. The plaintiff has no recollection of the incident and there were no witnesses to the incident. The only other person in the pool vicinity at the time was Letitia, who did not witness any dive as she had her back to the plaintiff, facing the motel units.[167] Letitia was in the jacuzzi at this time.[168]

[115] Where there is no direct evidence of the incident the plaintiff accepts that the facts proved must form a reasonable basis for the conclusion to be drawn that the plaintiff sustained her injuries as a consequence of diving into the pool and striking her head. In *Girlock Sales Pty Ltd v Hurrell*,[169] Stephen J set out a passage from an early decision of the High Court in *Bradshaw v McEwans Pty Ltd*[170] as follows:

> "you need only circumstances raising a more probable inference in favour of what is alleged … where direct proof is not available it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture … All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood." (Citations omitted).

[116] A court is not authorised however "to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others."[171] A court may not speculate but is confined to drawing proper inferences from the evidence.[172]

[117] The defendant submits that the Court should find no conclusion may properly be reached on the balance of probabilities as to the circumstances of the injury.[173] If, contrary to the defendant's primary submission, the Court is disposed to find a *probable* rather than a *more possible* mechanism of injury, in descending order of prospect the defendant identifies the following possibilities:

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166 Further Amended Defence, [9].
167 T1-59, lines 16 to 22.
168 T1-59, line 27.
169 (1982) 149 CLR 155 at 161-162.
170 (Unreported: High Court; 27 April 1951).
171 *Miller v Livingstone Shire Council & Anor* [2003] QCA 29 at [31] per Helman J referring to *Jones v Dunkel* (1959) 101 CLR 298 at 305 per Dixon CJ.
172 *Luxton v Vines* (1952) 85 CLR 352 at 358 per Dixon, Fullagar and Kitto JJ and *Rhesa Shipping Co SA v Edmonds* (1985) 1 WLR 948 at 955-956 per Brandon LJ.
173 Defendant's Submissions, [1(n)].

> "i. [the plaintiff] ran to the pool intending to jump but tripped on the 300cm plus raised pool coping and fell forward without arm protection in a physical orientation as depicted in the diagram attached to Dr Tuffley's note (Exhibit 6). This is the only activity in which she was seen by an independent person to engage, and a very likely mechanism of injury
>
> ii. [the plaintiff] ran as aforesaid and due to a slip on the coping (as was a prospect for someone running), entered the pool in an awkward orientation to the same effect.
>
> iii. [the plaintiff] struck her head on the coping while attempting to propel herself up out of the water.
>
> iv. that as a result of a slip, trip or loss of balance [the plaintiff] fell against the coping.
>
> v. [the plaintiff] attempted a dangerous "side dive", striking her head on the coping.
>
> vi. [the plaintiff] intentionally dived into the pool in a deep, dangerous dive (the full ramifications of which she was aware)."[174]

[118] In determining the mechanism of the plaintiff's injuries it is necessary to consider the evidence of Dr Tuffley, orthopaedic surgeon, and the expert engineering report of Mr McDougall.

[119] Dr Tuffley provided three reports dated 19 March 2003, 9 March 2004 and 28 September 2016.[175] In his report dated 19 March 2003 Dr Tuffley states:

> "Given that Karla was found face down in a swimming pool unconscious, and that subsequent radiographs demonstrated a burst fracture of C5, the most likely mechanism of injury would have been striking her head on the bottom of the swimming pool such that she sustained a compression/flexion force to her cervical spine. It is difficult to imagine any other mechanism of injury which could have occurred in the surrounds of the swimming pool and which would have led to this pattern of injury."

[120] In the same report Dr Tuffley referred to the plaintiff's initial diagnoses as including a burst fracture of the fifth cervical vertebra complicated by tetraplegia, aspiration pneumonia and a closed head injury. In his subsequent report dated 9 March 2004 Dr Tuffley believes that this initial diagnosis which included a closed head injury was provided by the Princess Alexandra Hospital. Dr Tuffley further states:

> "Not withstanding [sic] the above, it is almost 100% likely that Karla Lennon did suffer a blow to her head in order to produce the burst fracture of her 5th cervical vertebra. I am not aware of any other mechanism by which such a cervical spine injury can occur. The fact that the Gympie Hospital notes contain the comment, "no external sign of trauma" makes it most likely that the force applied to Ms Lennon's head occurred by her head striking the bottom of the swimming pool. If she had fallen into the surrounds of the pool,

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[174] Defendant's Submissions, [1(o)(i)] to [1(o)(vi)].
[175] Exhibits 4, 5 and 6.

> or had fallen against the pool edge, it would have been more likely that there would have been an abrasion or laceration to her skull.
>
> The term "closed head injury", is rather unspecific, and refers to any injury to the head where there is no major external head injury. The term "closed head injury" covers a spectrum from mild concussion to a diffuse intra-cranial injury from which the patient never recovers consciousness."

[121] In order for the plaintiff to be transported from Gympie Hospital to the Royal Children's Hospital in Brisbane a retrieval team consisting of two doctors was utilised.[176] The retrieval doctors as a matter of routine examined the plaintiff and completed a "retrieval record".[177] The retrieval record, beside the word "lesions", notes "abrasion to head". Beside the word "comments" the retrieval record states "bump to head (above forehead)". There is no evidence before the Court as to how this abrasion or bump to the head occurred. Mr Wood, the paramedic who attended the Gympie Motel shortly after the incident did not notice or record any trauma to the plaintiff's head.[178] He accepted that moving a patient of the plaintiff's weight could create a risk of some trauma occurring, such as an abrasion.[179] Mr Wood accepted however, that where a patient is unconscious and has possibly suffered a neck injury, considerable care would be taken to avoid any secondary injury.[180] Dr Costello was the doctor at the Emergency Department at Gympie Hospital who first treated the plaintiff. Dr Costello's notes do not record any external signs of trauma.[181] He accepted in cross-examination however, that he was, at the time, more concerned with the plaintiff's life-threatening issues, than with the identifying minor injuries.[182]

[122] In his most recent report of 28 September 2016[183] Dr Tuffley noted that an MRI scan confirmed interspinous ligament and ligamentum nuchae damage. Soft tissue damage in the region of C5 was also readily identifiable on the MRI scan. Dr Tuffley confirmed that the body of C5 was damaged so that it impinged upon the spinal cord. This is what is described as a "burst" fracture. Dr Tuffley referred to some diagrams prepared by F. Netter M.D., annexed to Exhibit 6, as demonstrative of the type of "burst" fracture in question. The diagrams depict a diver hitting his head on the bottom of a pool.

[123] Whilst Dr Tuffley accepted that the retrieval record which noted an abrasion and bump to the plaintiff's head constituted an accurate record,[184] the Gympie Hospital notes contained the comment "No external sign of trauma".[185]

[124] Dr Tuffley's report of 28 September 2016 continues:

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[176] T2-40, lines 40 to 45.
[177] T2-41, lines 1 to 6; Exhibit 27.
[178] T3-9, lines 26 to 27.
[179] T3-9, lines 30 to 34.
[180] T3-10, lines 42 to 45.
[181] Exhibit 18.
[182] T2-41, lines 8 to 16.
[183] This is not a report as such but rather a memo of a note of a conversation between Dr Tuffley and counsel solicitor conducted on 26 September 2016.
[184] T2-50, lines 22 to 26.
[185] Exhibit 6 and Exhibit 18.

> "Dr Tuffley suggested that there were four 'possible' mechanisms of injury in this situation:
>
> - Karla dived in and hit her head at the bottom of the pool;
> - Karla dived from the side of the pool with enough momentum to have her head strike the opposite wall;
> - Karla slipped and performed a dive into the pool to avoid falling, striking the surrounds of the pool;
> - Karla slipped and fell at the edge of the pool.
>
> The 'burst' fracture would have required a significant amount of force to be applied by way of *compression* to Karla's head. The picture depicted by Netter is an example of the application of the force that might be required. In addition, there is likely to have been some *flexion* to cause the injury by the interspinous ligament, ligamentum nuchae and the soft tissue injury. As there was no visible signs of trauma, it is likely that the initial collision between the surface and the head was above the hairline, causing the compression damage, with some flexion movement thereafter.
>
> If Karla slipped and fell and struck her head on the side of the pool or nearby, it is likely one would see a laceration or some head trauma. It is difficult to comprehend how a slip and dive might eventuate, such that Karla ended up in a position whereby she could get into a position to strike the bottom of the pool with sufficient force to sustain the compression injury. Similarly, in order to dive from one side of the pool to the other and to generate enough force to cause the compression injury by striking one's head on the side of the pool, Karla would need to be moving at a relatively rapid speed when she reached the other side of the pool.
>
> Although each of the above scenarios is possible, it is highly probable, and certainly more probable than not, that Karla dived into the pool and hit her head on the bottom of the pool. The compression forces required to cause the burst fracture, the flexion injury associated with flexing of the head after the initial impact, the absence of any obvious external trauma to the head are all consistent with the injury occurring by Karla's head striking the bottom of the swimming pool."

[125] Whilst Dr Tuffley identifies four possible mechanisms his opinion is, in light of the nature of the injuries, that the plaintiff dived into the pool and hit her head on the bottom of the pool. The defendant submits however, that Dr Tuffley in effect dismisses the other possible mechanisms because of the absence of a laceration or some head trauma.[186] As the retrieval report notes both an abrasion and lump to the plaintiff's head the three other possible mechanisms, according to the defendant, remain equally in play. This submission should be rejected. The absence of any obvious external trauma to the head was only one factor identified by Dr Tuffley in arriving at the most probable mechanism. The other matters identified by Dr Tuffley as supporting his opinion were: (a) the compression forces required to cause the burst fracture; and (b) the flexion injury

[186] T3-34, lines 29 to 36; Defendant's Submissions, [16(a)].

associated with flexing of the head after the initial impact. It is the combination of all three matters that support Dr Tuffley's opinion.

[126] The noted abrasion and lump on the plaintiff's head remain, on the evidence, unexplained. The bump on the plaintiff's head was above the forehead. I am unable to determine, on the evidence, whether such a lump is consistent or inconsistent with the plaintiff diving into the pool and hitting her head on the bottom of the pool. This scenario is however consistent with the compression forces required to cause the burst fracture and the flexion injury associated with flexing of the head after the initial impact. There is no evidence which establishes that the abrasion and lump could not possibly have happened in the course of a dive which resulted in the plaintiff hitting the bottom of the pool or when the plaintiff was recovered from the pool.[187]

[127] Mr McDougall produced a report dated 27 September 2016.[188] He inspected the pool on 14 March 2000. Figures 7 and 11 in his report plot the centre line depth of the pool. The pool is 10 metres in length. Exhibit 15 shows the depth of the pool from a length of one metre from the shallow end to a length of 8.6 metres from the shallow end. The pool depth grows each metre from 920 mm at the one metre mark to the deepest point of the pool of 1740 mm at the eight metre mark.

[128] Mr McDougall, in compiling his report, proceeded on the assumption that the plaintiff dived into the pool.[189] He also assumed that the dive which was executed by the plaintiff was one which resulted in the plaintiff hitting the bottom of the pool.[190] Any finding as to the mechanics as to how the plaintiff's injuries occurred is a matter for the Court. Mr McDougall, by proceeding on these assumptions, was not swearing to the issue but rather was testing the plaintiff's scenario from the perspective of an expert mechanical engineer.

[129] Mr McDougall opines that the plaintiff's injuries are consistent with the most common injuries resulting from head impacts after diving and that much of the pool depth is within the range where significant head impact velocities would be expected for normal dives.[191] In offering this opinion Mr McDougall recognised that one cannot precisely reflect the possible dive in question as any impact could occur at a head velocity influenced by the angle of the dive, the initial velocity and other factors.[192]

[130] Mr McDougall concludes: [193]

> "The characteristics of a swimming pool installation were examined for their likely association with injuries incurred by a pool patron. These injuries included a C5 burst fracture of the cervical spine. It was noted that this was the most prominent of fractures associated with diving related incidents which

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[187] See the discussion of an unexplained injury in a diving accident by Mahoney JA in *Inverell Municipal Council v Pennington & Anor* (1993) 82 LGERA 268 at 269-270.
[188] Exhibit 3.
[189] Exhibit 3, page 11, line 18; T2-10, lines 30 to 35.
[190] T2-10, lines 36 to 38.
[191] Exhibit 3, page 10.
[192] Exhibit 3, page 10.
[193] Exhibit 3, page 18.

> arise from head impact on the bottom of a pool. It was also noted that the pool depth in question was such that damaging head impacts – that is, those with velocities above a damage threshold – could be expected for many standard dives."

One of the factors relevant to such incidents as identified by Mr McDougall is where the relevant pool was not of sufficient depth to prevent damaging head impacts from normal dives.

[131] Mr McDougall did not consider any other mechanism apart from a dive where the plaintiff hit the bottom of the pool. He was however questioned in relation to Dr Tuffley's diagram of a relevant dive, which is part of Exhibit 6: [194]

> "That's not a normal dive or a standard dive?--- It seems to be very shallow water of the order of, perhaps, less than two feet.
>
> Yes?--- Just proportioned to the – the body of an adult, the research talks about normal dives being typically 45 degrees. I would, perhaps, suggest that this would not be the angle at which the person entered the water, but, perhaps, as a consequence of his head impacting the surface and being flexed forwards a little bit further than normal.
>
> All right. That person is entering the water at a near vertical dive, though?--- No. I would challenge that. If – if we looked at the axis of the body, it would be around about 45 degrees.
>
> And the impact with the head is above the forehead in the hair?--- In that particular one, yes.
>
> All right. Is that what you assumed to be the required mechanism of injury?--- That's a little bit outside my area of expertise. I've just relied on – on the research about more generally head impacts in shallow water.
>
> But, you see, your report is premised upon the opinion of Dr Tuffley as to the mechanism of injury?--- He has – he has said a particular statement about hitting the bottom, yes. It was one of the – it just led me to the assumption that the injury will be consistent with a person hitting the bottom of a pool in a dive.
>
> Right. And hitting in that mechanism, is that what you've assumed, or have you assumed some other mechanism?--- I haven't assumed any particular mechanism other than more generally of hitting the bottom of the pool."

[132] Mr McDougall stated that if a person dived in a 45 degree angle from the pool edge then he would expect the diver to hit the bottom. This may suggest that a 45 degree dive is not a standard or normal dive.[195] He accepted that ordinarily a diver would control the trajectory and horizontal speed of a dive.[196] Mr McDougall emphasised however, that

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[194] T2-11, lines 16 to 44.
[195] T2-17, lines 22 to 37.
[196] T2-23, lines 15 to 22.

the research shows that the angle at which children in particular dive and those who have not had significant training is not consistent.[197]

[133] Two of the defendant's alternative scenarios were put to Mr McDougall in cross-examination. He agreed that a side dive would not be a recommended dive for the motel pool.[198] This is because there is a chance of hitting the side of the pool.[199] Mr McDougall accepted that a person might strike the coping of the pool with their head if they sought to propel themselves out of the water.[200] Mr McDougall was of the opinion however, that to generate the necessary velocity to propel oneself out of the water the person would need to go closer to the vertical, which would more likely result in a facial rather than a head impact.[201] Mr McDougall also noted that the coping did not extend beyond the interior wall of the pool but was completely flush.[202]

[134] The plaintiff submits that the weight of the evidence establishes that it is more probable than not, that the plaintiff struck her head on the base of the pool after diving into the pool. I accept this submission because of the following matters.

[135] First is the position in which the plaintiff was found floating face-down in the pool. She was approximately in the middle of the pool with her head facing towards the manager's office; that is, towards the shallow end.[203] The position in which the plaintiff was found is consistent with her having dived from the deep end of the pool. Senior Counsel for the defendant accepted that the plaintiff's position and orientation when found in the pool "clearly indicate that if there was a dive, it occurred from the deep end of the pool towards the shallow end."[204]

[136] Secondly, as discussed in [88] to [89] and [99] to [100] above, I accept that the plaintiff was diving into the pool immediately prior to her injuries being sustained.

[137] Thirdly, the plaintiff executing a dive is generally consistent with Letitia's evidence as recorded in [90] above, that she could feel the waves from the plaintiff's dives hitting the back of her.

[138] Fourthly, as discussed in [125] above, the plaintiff's scenario is, in Dr Tuffley's opinion, consistent with the compression forces required to cause the burst fracture and the flexion injury associated with flexing of the head after the initial impact.

[139] Fifthly, whilst Mr McDougall proceeded on the assumption the plaintiff dived into the pool, his opinion is that the plaintiff's injuries are consistent with the most common injuries resulting from head impacts after diving and that much of the pool depth is within the range where significant head impact velocities would be expected for normal dives.[205]

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[197] T2-23, line 45 to T2-24, line 2.
[198] T2-24, lines 33 to 34.
[199] T2-24, lines 36 to 37.
[200] T2-24, line 39 to T2-25, line 2.
[201] T2-25, lines 8 to 12.
[202] T2-34, lines 25 to 28.
[203] See [114] to [115] above.
[204] T3-40, lines 10 to 11.
[205] See [129] above.

Mr McDougall also concluded that the type of injury sustained by the plaintiff was the most prominent fractures associated with diving-related incidents which arise from head impact on the bottom of a pool.[206]

[140] These five matters, in my view, give rise to "a reasonable and definite inference"[207] that the plaintiff sustained her injuries when she dived from the deep end of the pool and struck the bottom of the pool.

[141] This finding is to be contrasted with the lack of evidential support for the defendant's alternative scenarios. As to the first scenario that the plaintiff ran to the pool intending to jump but tripped on the coping, the defendant submits that this scenario is "fully supported by the evidence of Mulcahy as to what he actually saw her doing".[208] I discuss Mr Mulcahy's evidence in [101] to [105] above. When Mr Mulcahy's evidence is considered as a whole, it is apparent that he was not watching what the girls were doing closely.[209] His evidence that the girls were "running to the side and jumping" was volunteered by Mr Mulcahy in clarifying what he meant by "jumping in and out of the pool".[210] Whilst Mr Mulcahy did not observe the plaintiff and Letitia executing belly-flops or dives, I have found that immediately prior to the incident the girls had been executing dives into the pool. Whatever "running" Mr Mulcahy observed, the conduct was not of a nature that required him to say something to the plaintiff or Letitia about their behaviour. Another difficulty with this scenario is that it assumes the behaviour of the plaintiff and Letitia did not alter after Mr Mulcahy left the pool. The plaintiff and Letitia were by themselves for something in the order of 10 to 15 minutes in the pool prior to the incident. Further, this scenario was not put to Mr McDougall. There is no evidence as to where, for example, the plaintiff would have been running from. From the photographs, in particular Exhibit 1D to G, there appears to be no running room at the deep end of the pool. The only area where one could run to jump into the pool is where the chairs are shown in Exhibit 1G. If the plaintiff was to run from that area and trip on the coping resulting in a dive, as described by Dr Tuffley in the diagram in Exhibit 6, it would be difficult to understand how the plaintiff was discovered unconscious in the pool with her head facing the shallow end.

[142] As to the scenario that the plaintiff attempted a dangerous "side dive", striking her head on the coping, there is simply no evidence that either the plaintiff or Letitia executed any side dives at the pool. There was reference to side diving in counsel's opening of Carol Lennon's evidence:

> "She will say that before she left the pool, she had a conversation with the children about their behaviour, and she will say she can't remember precisely what it was she said to them before she left, but her concern was twofold. The first was that Karla was a large 12 year old child. She was 173 centimetres tall and she was a strapping girl, and she was concerned of jumping into the pool or dive-bombing, or another thing that she used to do was called side diving, which is where you would stand on the edge of a pool or stand on the

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[206] See [130] above.
[207] *Girlock Sales Pty Ltd v Hurrell* (1982) 149 CLR 155 at 161-162 per Stephen J.
[208] Defendant's Submissions, [16(b)].
[209] T1-77, line 25.
[210] T1-77, lines 20 to 24.

> edge of whatever and dive in sideways without necessarily looking at where you were diving into."[211]

[143] In her evidence-in-chief Carol Lennon did not refer to any concern she held in relation to the plaintiff executing a side dive at the pool. In cross-examination she stated that she had not seen the plaintiff execute a side dive.[212] She did not think that she had ever previously stated that the plaintiff did side dives.[213] I accept, based on counsel's opening of Mrs Lennon's evidence, that she knew that the plaintiff had previously executed side dives. It remains the case however, that there is no evidence that any side dives were executed by the plaintiff on the day in question. The scenario of a side dive was put to Mr McDougall. Whilst he agreed that a side dive increased the potential for head impact, such an impact would be with the side of the pool.[214]

[144] As to the scenario of the plaintiff striking her head on the coping as she propelled herself out of the pool, it is difficult to see how such a manoeuvre would result in the plaintiff's injury in circumstances where the coping did not overlap with the side of the pool. Further, it is again difficult to reconcile the plaintiff's position in the pool with her striking her head on the side of the pool or the coping in executing such a manoeuvre.

[145] As to the scenario that the plaintiff tripped or fell onto the coping, whilst such a scenario may explain an abrasion or lump within the hairline, it does not explain the injuries identified by Dr Tuffley. Again, if the plaintiff tripped and fell onto the coping, it is difficult to understand how she could have been in the position in the pool, as identified by Mr Mulcahy in Exhibit 12.

[146] Only two of the defendant's scenarios were put to Mr McDougall. There is therefore no expert engineering evidence which explains the mechanics of the other scenarios suggested by the defendant.

[147] The defendant's scenarios are, in my view, speculative and constitute mere possibilities. The finding that I have made as to the mechanics of the injury is supported by five evidentiary foundations from which a proper inference may be drawn.

Duty of Care

[148] The existence of a duty, owed by the defendant as the occupier of the Gympie Motel to the plaintiff, is not disputed. The plaintiff alleges and the defendant accepts that the defendant owed a duty of care, as operator of the motel and occupier of the premises, to take reasonable care in the circumstances. However the parties disagree as to the content of the duty owed.[215]

[149] The duties pleaded by the plaintiff said to be owed by the defendant are:

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[211] T1-19, lines 6 to 13.
[212] T1-91, line 28.
[213] T1-91, lines 39 to 41.
[214] T2-24, lines 23 to 24 and lines 36 to 37.
[215] T1-7, lines 9 to 34; Second Further Amended Statement of Claim, [3]; Further Amended Defence, [3(c)].

(a) to exercise reasonable care and skill for the safety of the plaintiff during the course of the plaintiff's stay at the motel;

(b) to take all reasonable steps to warn the plaintiff of any hidden or concealed dangers of which the plaintiff may not be aware;

(c) to ensure that facilities provided by the defendant, including the swimming pool, were safe for use by the plaintiff and contained no hidden or concealed dangers.[216]

[150] The defendant admits that its duty of care, as operator of the motel and occupier of the premises, was to take reasonable care in the circumstances. The defendant otherwise denies as untrue in the law the formulation of the tortious duty of care alleged by the plaintiff.[217] In its written submissions the plaintiff identifies the relevant duty as being a duty to exercise reasonable care and skill for the safety of persons at the Gympie Motel. Counsel for the plaintiff in his opening articulated the duty as follows:

> "I think the duty is relatively clear in that there is a broad duty on the occupier and operator of the motel to exercise reasonable care for entrants and users of the pool."[218]

[151] In *Australian Safety Stores Pty Ltd v Zaluzna*[219] Mason, Wilson, Deane and Dawson JJ identified the duty of an occupier as one to take reasonable care to avoid a foreseeable risk of injury.

[152] More specifically in relation to pools, Mahoney JA in *Inverell Municipal Council v Pennington & Anor*[220] identified the relevant duty as follows:

> "Those in control of the pool had, in general, a duty to take care for the safety of those using it. This is reasonably plain. The risk of injury from diving in shallow water is well recognised. They were, in the relevant sense, in sufficient proximity to users of the pool to require that they take proper precaution. This, I think, has not been seriously in question: see generally, *Nagle v Rottnest Island Authority* (1993) 67 ALJR 426 (High Court)."[221]

[153] The duty of care identified by Mason CJ, Deane, Dawson and Gaudron JJ in *Nagle v Rottnest Island Authority*[222] was a general duty of care at common law to take reasonable care to avoid foreseeable risk of injury to visitors lawfully visiting the Reserve.

[154] In *Kelly v State of Queensland*[223] McMeekin J stated that the defendant in that case, which had the care, control and management of Fraser Island, owed a duty to lawful entrants to

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[216] Second Further Amended Statement of Claim, [3].
[217] Further Amended Defence of the Defendant, [3(a)] and [3(c)].
[218] T1-4, lines 38 to 40.
[219] (1987) 162 CLR 479 at 488.
[220] (1993) 82 LGERA 268.
[221] (1993) 82 LGERA 268 at 269.
[222] (1993) 177 CLR 423 at 429.
[223] [2013] QSC 106 at [77].

that area, such as the plaintiff, to take reasonable care to protect them from risk of physical harm.

[155] The duty is that identified by the High Court in *Australian Safety Stores,* namely a duty to take reasonable care to avoid a foreseeable risk of injury. Such a duty in the context of a motel providing a swimming pool for guests encompasses the duty identified by Mahoney JA in *Inverell,* namely a duty to take care for the safety of those using the pool.

Breach of Duty

[156] The defendant accepts that the risk of a pool user suffering injury in its pool in a variety of ways was foreseeable.[224] It may therefore be accepted that a reasonable person in the defendant's position would have foreseen that by providing a pool facility to motel guests this involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. The preliminary inquiry identified by Mason J in *Wyong Shire Council v Shirt*[225] may, therefore in the present case, be answered in the affirmative. What is then required to determine a breach of duty is stated by Mason J as follows:[226]

> "If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of 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."

[157] His Honour continued:[227]

> "The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors."

[158] Mahoney JA in *Inverell*, by reference to the above quoted passages of Mason J in *Shirt* observed: [228]

> "In my opinion, the judgment of Mason J establishes that the law does not in every case require a defendant to go so far. It measures what the defendant is to do by the response of a reasonable person. That response is to be measured by inter alia, the considerations to which his Honour has referred,

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[224] Defendant's Submissions, [31].
[225] (1980) 146 CLR 40.
[226] (1980) 146 CLR 40 at 47.
[227] (1980) 146 CLR 40 at 48.
[228] (1993) 82 LGERA 268 at 272.

> namely, the magnitude of the risk, the probability of its occurrence, the seriousness of the injury, what is necessary to guard against it, and the resources available to the defendant to provide against it."

[159] In considering those matters in *Inverell* Mahoney JA concluded:[229]

> "The danger from diving into shallow water is well recognised: it is the kind of thing of which a public pool owner must be conscious. The damage apt to result from the danger, if it eventuates, is apt to be very great: it is well known as a source of paraplegia or quadriplegia. The precautions which may be taken are simple and involve no greater cost. Warning signs and depth marking will often be sufficient. In these circumstances the response of a reasonable person who has set up or conducts a pool facility would, in my opinion, be to guard against the risk of inadvertence in this way."

[160] In the present case the plaintiff identifies the relevant risk as being that a person (including a child) may misjudge the depth of the pool, dive into the pool in a place that was too shallow and strike their head on the bottom or side of the pool, causing them to suffer spinal injury. The consequences were catastrophic.[230] Mr McDougall is of the opinion that diving into this pool was unsafe in any area.[231] This is because much of the pool depth is within the range where significant head impact velocities would be expected for normal dives. The plaintiff therefore submits that the risk of injury was reasonably foreseeable by the defendant. The defendant admits that children and adults use the pool on a regular basis. The risk of diving accidents in swimming pools is well known and documented and the defendant knew, or ought to have known, of such risk and taken action to safeguard against it.[232] The plaintiff therefore submits that "there really was no safe diving in this pool".[233]

[161] The risk identified by the plaintiff is that no person, including the plaintiff, should dive into the motel pool. This risk is identified by Mr McDougall in his report by reference to Australian Standards. The foreword to AS2818-1993 states:

> "The effectiveness of any installed safety measures is dependent on their proper use or observance by the pool user.
>
> It is intended that the pool owner, having regard to the information and recommendations in this guide should determine which safety considerations are appropriate for the particular situation.
>
> The Standard includes recommendations on aspects of pool safety which relate to persons of all ages. The recommendations set out are mainly concerned with preventative safety rather than first-aid measures, which are already well established and widely publicised.

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[229] (1993) 82 LGERA 268 at 273.
[230] Plaintiff's Outline of Argument at Trial, [47].
[231] Exhibits 15 and 16; T2-23, lines 30 to 35.
[232] Plaintiff's Outline of Argument at Trial, [50]; Exhibit 3, pages 10 to 11 where Mr McDougall discusses the relevant Australian Standards; see further Exhibit 17.
[233] T3-61, lines 7 to 9.

> Recommendations in this Standard reduce the risk of injury or drowning but do not reduce the importance of competent supervision nor the responsibility of the pool owner."

[162] Clause 8 of the Standard states:

> "Unless specifically designed for diving, private pools should not be used for that purpose … Serious injury can result from diving into a pool that is not of sufficient size."

[163] Clause 17(s) of the Standard provides:

> "Don't dive into the pool unless it is specifically designed for diving."

The Standard generally provides that the responsibility for establishing the rules for conduct in and around the pool lies with the pool owner.

[164] Mr McDougall whilst accepting that a sign requiring children to be supervised by an adult would have an important role, was of the view that it should not have been the only sign for this pool.[234]

[165] After the accident the defendant placed a "no diving" sign in the pool area, together with one depth marker identifying the shallow end of the pool. The installation of these signs after the incident does not constitute an admission of a breach of duty nor evidence of negligence. The installation of the signs however, does demonstrate that it was reasonably practicable for the defendant to have taken these steps prior to the plaintiff's injury. There is no suggestion that the installation of these signs was an expensive exercise.[235]

[166] The mere fact that a "no diving" sign would be inexpensive and relatively easy to install does not, of course, determine whether the defendant's duty has been breached. As observed by Gleeson CJ and Kirby J in *Vairy v Wyong Shire Council*:[236]

> "Observation confirms that, in this community, it is accepted that there may be some circumstances in which reasonableness requires public authorities to warn of hazards associated with recreational activities on land controlled by those authorities. Most risky recreational activities, however, are not the subject of warning signs. It is impossible to state comprehensively, or by a single formula, the circumstances in which reasonableness requires a warning. The question is not answered by comparing the cost of a warning sign with the seriousness of possible harm to an injured person. Often, the answer will be influenced by the obviousness of the danger, the expectation that persons will take reasonable care for their own safety, and a consideration of the range of hazards naturally involved in recreational pursuits."

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[234] T2-33, lines 1 to 8.

[235] See *Nelson v John Lysaght (Australia) Ltd* (1975) 132 CLR 201 at 214-215 per Gibbs J; *NSW Land and Housing Corp v Watkins* [2002] NSWCA 19 at [78] per Heydon JA, Hodgson JA agreeing.

[236] (2005) 223 CLR 422 at 427, [8].

[167] The defendant submits that it has not breached its duty of care because of two primary considerations. First the defendant submits that its precaution of pool use by children only under adult supervision was the only effective precaution which could be taken in discharge of its duty of reasonable care to all pool users of the class of which the plaintiff was one.[237] Secondly, the defendant submits that the absence of depth markers or a "no diving" sign do not constitute a breach of duty because of the obviousness of the risk of diving into the pool.[238]

[168] As to the first submission, the defendant contends that the requirement for adult supervision was circumvented by Carol Lennon who facilitated the plaintiff and Letitia's entry into and their use of the pool. To that extent at least, it may be said that Carol Lennon's decision to allow them to use the pool was probably regarded as a use "under (her) adult supervision". Consequently, according to the defendant, in their use of the pool, the plaintiff and Letitia must be regarded as having remained in Carol Lennon's care and control.[239] According to the defendant, in the ordinary course adult supervision of the plaintiff would have ensured that any potentially dangerous activity in which the plaintiff chose to engage, including diving into the pool, did not occur or occurred only under the supervision of an adult confident in the child's ability to do so safely.[240] The requirement for adult supervision alleviated the defendant of the need to display a "plethora of signs" prohibiting for example, running, jumping, pushing and dive bombing.[241]

[169] The issue in respect of this first submission was articulated by Senior Counsel for the defendant as "should the defendant have taken some other measure beyond the measures it took to discharge its duty".[242] In *David Jones (Canberra) Pty Ltd v Stone*[243] the High Court considered the situation where a child was injured whilst using an escalator. The escalator was signed so as to require a child to be accompanied by an adult. Owen J and Walsh J held that such a sign was sufficient for the department store owner to discharge its duty of care. Owen J stated: [244]

> "Accordingly, in considering whether the defendant failed to exercise reasonable care towards the plaintiff, I think it is relevant to have regard to the fact that the invitation to use the escalator was, in the case of children, limited to its use only if accompanied by an adult in the sense of being under adult control; that the plaintiff freed himself from his mother's control, sat down on the step and either by accident or design put his fingers into the gap. This cannot, in my opinion, be regarded as an ordinary or usual way in which a child under the control of its mother would be expected to use an escalator and I am of the opinion that it would not be reasonable in all the circumstances to regard the defendant as having failed to fulfil any duty of care owed by it to the boy."

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[237] Defendant's Submissions, [1(p)].
[238] Defendant's Submissions, [21].
[239] Defendant's Submissions, [34].
[240] Defendant's Submissions, [34].
[241] Defendant's Submissions, [23] to [25].
[242] T3-37, lines 37 to 38.
[243] (1970) 123 CLR 185.
[244] (1970) 123 CLR 185 at 196 per Owen J, at 199-200 per Walsh J. See also *Simpson v Grundy* [2013] 2 Qd R 384 at 396, [52]-[55] per Dalton J and *Falhaber v Rockhampton City Council* [2011] QSC 23 at [58] per McMeekin J.

[170] In *Roads & Traffic Authority of NSW v Dederer*[245] the relevant authority had erected signs prohibiting diving from a bridge. The diver understood the signs and knew that the estuary contained channels of variable depths and a sandbar of shifting dimension. Gummow, Callinan and Heydon JJ held that the authority had discharged its duty of care. Its obligation was not to prevent harm, but only to exercise reasonable care to make the bridge safe for users exercising reasonable care for their own safety. While the risk of injury was reasonably foreseeable, the probability of injury occurring was low. The erection of the signs was a reasonable response to the foreseeable risk. Similarly here, the defendant submits that the sign requiring adult supervision for children was a reasonable response to the foreseeable risk of a child diving into the pool. The defendant also refers to the fact that there was no history of any prior injury in the motel pool.[246] The frequency with which the relevant activity is undertaken and the fact that no injury has been caused is only one of a number of matters that must be weighed in determining what is a reasonable response in the circumstances:

> "Depending on the circumstances, a response may be called for, even where the risk of serious injury or death might be objectively low. What is required, as is made plain in *Shirt*, is an assessment of all the circumstances, including the likelihood of death or injury, and the cost and practicality of any possible response."[247]

[171] The difficulty I have with the defendant's first submission is that it is premised on the basis that depth markers or a "no diving" sign were not reasonably required because of the sign requiring adult supervision. Depth markers and a "no diving" sign provide additional information to all users of the pool, including children and adults supervising those children. Mr McDougall in his report refers to Australian Standard AS2416 – 1995, Design and Application of Water Safety Signs. This Standard provides guidance on the design and application of water safety signs. These signs have been tested for comprehension in accordance with Australian Standard AS2342 – 1992 and are recommended to be used without words. Two of those signs include sign 213 – "Diving prohibited" and sign 228 – "Beware of shallow water when diving". Mr McDougall is of the opinion that sign 213 or, to a lesser extent, sign 228 would have been appropriate for this pool situation.[248]

[172] Further, there are a number of factors which, in my view, required the installation of such a sign in order for the defendant to discharge its duty of care:

(a) the defendant was the operator of the motel and had control of the swimming pool;

(b) the defendant encouraged its guests to use the swimming pool for their enjoyment;

(c) children were regular guests at the motel and the defendant knew that child guests regularly used the swimming pool for recreational swimming;

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[245] (2007) 234 CLR 330.
[246] Mr Perrett's Statement, Exhibit 25 and Mr Phillips' Statement, Exhibit 26.
[247] *Gosling v Lorne Foreshore Committee of Management Inc* (2009) 25 VR 203 at [52].
[248] Exhibit 3, page 13.

(d) the dangers of diving into a swimming pool not designed for diving is a well known risk;

(e) the likely consequences of the risk occurring were catastrophic;

(f) a sign prohibiting diving and depth markers would have operated as a direct and immediate warning to users of the pool as to the dangers of diving;

(g) the precautions which could have been taken (and which were subsequently taken) were simple and involved no great cost;

(h) apart from repeat guests at the motel, most users of the pool would not be familiar with its features and in particular the depth of the pool;

(i) the fact that the pool was shallower than four feet for at least half its length should have led to a prohibition on diving.[249]

[173] In these circumstances reasonableness required a warning, namely depth markers and/or a "no diving" sign.[250] As to the defendant's second submission that the risk of injury was so obvious such that depth markers or a "no diving" sign were not required, I am not satisfied that a 12 year old child would have been aware of this "obvious" risk so as to alleviate any necessity for the suggested precautions.

[174] In *Mulligan v Coffs Harbour City Council*,[251] Callinan and Heydon JJ observed:

> "Obviousness of a risk very much conditions the response, or even the necessity for any response at all to it.
>
> The appellant drew attention to the possibility that the vulnerable, children, the elderly, the physically and mentally impaired, the intoxicated and the exubertant would, on occasions, swim and dive in the channel. Of course, that is so. But it is in the nature of human affairs that people will possess very different attributes and sensibility. Similarly, there will be many who will neither see, nor if they do, bother to read or heed the most obvious of warnings. These may all be relevant factors in an appropriate case. They were simply not such as to require a different conclusion here in the light of the obviousness of the risk of diving in uncertain and unfamiliar clouded waters."

[175] In *Central Goldfields Shire v Haley*,[252] Redlich JA considered the issue of an obvious risk at [115]:

> "In *Mulligan v Coffs Harbour City Council*, Gleeson CJ and Kirby J, who were in the minority, but not as to this issue, concluded that 'the obviousness of a danger can be important in deciding whether a warning is required'. In

[249] Plaintiff's Outline of Argument at Trial, [64].
[250] See (2005) 223 CLR 442 at [8] per Gleeson CJ and Kirby J.
[251] (2005)223 CLR 486 at [78]-[79].
[252] (2009) 24 VR 378.

> *Vairy* ... McHugh J thought it seldom that the obviousness of a risk created or permitted by a defendant who owes a duty of care would require no action by that party. Gummow J did not regard the obviousness of the risk as a concept necessarily determinative of questions of breach of duty or the existence and content of that duty. He expressed agreement with Hayne J's observation that the description of a risk as 'obvious' was apt to mislead and could not be used 'as a concept determinative of questions of breach of duty' nor should it be elevated into some doctrine or general rule of law. Callinan and Heydon JJ referred to their reasons in the judgments in *Mulligan v Coffs Harbour City Council* that in a particular case obviousness might be of such significance as to carry with it such a very high degree of importance, as to be overwhelming and effectively conclusive and that in Ghantous v Hawkesbury City Council, 'five judges of court stressed, and treated obviousness as a decisive factor'. They referred to the observations of Gleeson CJ in *Woods v Multi-Sport Holdings Pty Limited* with whom Hayne J agreed, that obviousness may be decisive in relation to the recreational activity in which the plaintiff was there engaged. In *Woods v Multi Sport Holdings Pty Limited*, Gleeson CJ said that what reasonableness requires by way of warning from an occupier to an entrant is a question of fact, not law and as a proposition of fact, it is not of universal validity.
>
> Following the decisions in *Thompson, Mulligan* and *Vairy,* Ipp JA dealt with the concept of obviousness of risk in *Consolidated Broken Hill Limited v Edwards.* He said:
>
> > 'A common expression of principle as to the concept of obviousness of risk is manifest from the unanimous decision in *Thompson* and the judgment of both justices in *Mulligan* and *Vairy* who formed a majority on this issue. It can be articulated as follows. Obviousness of risk is not a phrase that denotes a principle or rule of the law of negligence. It is merely a descriptive phrase that signifies the degree to which risk of harm may be apparent. It is a factor that is relevant to whether there has been a breach of the duty of care … the weight to be attached to the obviousness of the risk depends on the totality of all the circumstances. In some circumstances, it may be of such significance and importance to be effectively conclusive.'" (Citations omitted).

[176] The plaintiff conceded in cross-examination that to dive into shallow water carried a significant risk of injury.[253] I have found, however, that the plaintiff did not dive from the shallow end. The mechanism of the injury was, on the balance of probabilities, a dive from the deep end of the pool. At the time she executed this dive which caused her injury she had been executing dives into the pool with Letitia for approximately 10 to 15 minutes. The obviousness of the risk to a 12 year old diving from the deep end of the pool to the shallow end is not in the same category of obviousness of risk considered by the High Court in *Mulligan v Coffs Harbour City Council.*[254] In that case a person became a quadriplegic as a result of shallow diving from within a channel in a tidal creek and

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[253] T1-41, lines 40 to 42; Exhibit 9.
[254] (2005) 223 CLR 486.

hitting his head on a sand dune. In the present case there was a real risk that a guest, including a child, may misjudge the depth of the pool and strike their head on the base of the pool when diving. I accept the plaintiff's submission that the risk was not sufficiently obvious as to alleviate the need to prohibit diving and install depth markers.[255]

Causation

[177] In *Thomas v Trades & Labour Hire Pty Ltd (in liq) & Anor*[256] Philippides JA considered the relevant principles in determining causation:

> "[85] …
>
> 4. In determining causation, the Court must consider the alleged breach of duty and, if the breach of duty is an omission, determine whether the plaintiff would have acted differently had the omission not occurred. Proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred. As Gotterson JA observed in *Wolters v University of the Sunshine Coast*:
>
> > "As noted, in *Sabatino*, Mason P reminded, as Gaudron J had pointed out in *Bennett v Minister of Community Welfare*, that in cases of negligence by omission, a finding of liability is necessarily based upon a hypothetical inquiry, Here, as principle required, the primary judge set about such an inquiry. It was into whether the incident (and hence injury) would have been avoided if the respondent had discharged its duty of care by taking appropriate action to reprimand and counsel Mr Bradley. That the incident occurred is a historical fact. Whether it would have been avoided is not, of itself, a fact. It is a conclusion with respect to the likelihood that the incident would have been avoided had the duty been discharged. The objective of the inquiry undertaken by the primary judge was to assess the likelihood of that.
> >
> > The frame of reference for such an inquiry is set by reference to that which the duty of care required have been done. The inquiry is undertaken by assessing all relevant facts and circumstances from which a conclusion is then drawn as to the likelihood that the performance of that which the duty required have been done, would have avoided the incident.
> >
> > The integrity of the inquiry is therefore dependent upon both a precise articulation of what it is that the duty of care required and an appraisal of all relevant facts and circumstances in order to assess likelihood. A failure to

[255] Plaintiff's Outline of Argument at Trial, [84].
[256] [2016] QCA 332.

> articulate the former or to undertake the latter risks a miscarriage of the inquiry and a resultant lack of legitimacy in the ultimate conclusion drawn from it." (Citations omitted).

[178] Gleeson CJ in *Public Trustee v Sutherland Shire Council*[257] considered the issue of causation in the particular context of a diving injury. In that case the plaintiff had dived into open water in Botany Bay from a walkway forming part of a public fence to tidal baths to retrieve a thong which had fallen off his foot. Gleeson CJ (with whom Priestley and Handley JJA concurred) held that the plaintiff had failed to establish that if an appropriate warning sign had been in place he probably would not have dived, and, accordingly, he had failed to establish the necessary causation of damage to sustain the judgment which had been given in his favour. The case was conducted on the basis that the Sutherland Shire Council should have erected a sign which prohibited diving. As observed by Gleeson CJ: [258]

> "What was alleged was that the pictogram in question should have conveyed a warning of some kind to the deceased, but there was a question as to the substance of that warning, and what, if anything, it would have told the deceased that he did not already know." (Citations omitted).

[179] The question of whether the defendant's negligence caused or materially contributed to the plaintiff's injuries is not an easy one. As stated by Gleeson CJ: [259]

> "The question is hypothetical in that it calls for a consideration of what would or might have happened had pictogram warning signs been set up by the respondent. The inquiry is subjective, and calls for a consideration of what the deceased himself would have done if warnings had been given." (Citations omitted).

[180] In *Public Trustee v Sutherland Shire Council* the deceased himself was not asked questions directly on the point and the evidence indicated that he had some, although limited, capacity to read and understand the existing warning signs. This is to be contrasted with the present case where the plaintiff gave specific evidence on the issue of her actions had there been a "no diving" sign. Her evidence-in-chief was as follows:[260]

> "Now, if – I want you to assume a hypothetical for a moment and that is that there was the no diving sign that you saw when you returned some years after. If that sign was on the wall back in February 19978, do you say you would have been diving into the pool at the Gympie Motel on that day?--- No.
>
> And why is that?--- Because there must have been a reason for that sign to be there if – you know, we always tried to follow the rules and if there was a rule it had to be there for a reason.
>
> Right. Any other reason as to why you would have in the company of Letitia not dived?--- Well, she was there and I was responsible for her and I had to

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[257] (1992) 75 LGRA 278 at 289.
[258] (1992) 75 LGRA 278 at 283.
[259] (1992) 75 LGRA 278 at 287.
[260] T1-36, lines 5 to 30.

set an example for her, so if I'd started diving, then she would have wanted to dive and, you know, it would have made a bad situation worse because not only would I have got into trouble, then I would have got Letitia into trouble as well.

You mentioned getting into trouble. Would it have given you any concern to get into trouble from the owner of the hotel or someone else?--- Well, it would have because we were staying there and you didn't want to get into trouble by anybody. I mean, it was sort of like when we went on the truck with dad. He'd go on to mine sits and things like that and you always had to make sure that, you know, you abided by the rules because if you didn't go on – if you went on to the mine site and got out of the truck when you weren't meant to, you could get hurt by a piece of equipment or somebody else and then there were repercussions for other people, not just me. It would be my dad would get into trouble and he wouldn't get on to the mine sites and then he wouldn't be able to do his job, so it wasn't only about me. It was the repercussions for other people."

[181] The plaintiff's evidence in cross-examination in respect of causation was as follows:[261]

"If there had been sign there that said no jumping I suggest you wouldn't have obveyed it?--- No jumping.

Mmm?--- Well, there's a reason. If there's a sign saying not to do something there's a reason for it.

Right. If your mother told you before she left you at the pool, don't jump, she would have had a reason for it too, wouldn't she?--- That's correct.

And if she'd given that instruction you say you would have obeyed it?--- If there'd been a reason for it, yes.

If there'd been a reason for it?--- Well, she would've said no and there would've been a reason why she would've said not to.

See if there was a sign there saying no bomb dives, no running, no diving, jumping, etcetera, you would've obeyed all those signs, you say?--- Yes.

Regardless?--- They're there for a reason.

Now, take me back one step. When your mother – if your mother gave you a direction about no jumping, no bomb dives, no diving in the pool, she would have a reason too?--- That's correct.

And you would have obeyed her because she had a reason?--- Yes.

See, I suggest that regardless of any signs, whatever occurred on the day of the accident, you would've done exactly what you did?--- No.

You wouldn't obey your parents at times; isn't that right?--- No.

Didn't you just concede to me there were times, like a kid, you didn't do what you were told?--- I said I may have done. I can't remember not doing it.

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[261] T1-47, line 22 to T1-48, line 16.

> If you didn't obey your parents from time to time, why would you obey a sign?--- Because the signs are there for a reason.
>
> I have to put to you as well that Ms Balmanno gave you specific pool safety instructions not to dive?--- Who's that?
>
> Ms Balmanno. She was your physical education teacher in 1997, terms 1 and 4, who took you for swimming?--- I don't remember.

[182] The defendant submits that the plaintiff's evidence with respect to her obedience to a notional "no diving" sign should be rejected and a finding made that the plaintiff would not have obeyed any such sign. The defendant submits that the plaintiff's "after the facts" evidence that she would have obeyed a "no diving" sign is open to serious question.[262] The defendant refers to the observation of McHugh J in *Chappel v Hart*:[263]

> "Human nature being what it is, most plaintiffs will genuinely believe that, if he or she had been given an option that would or might have avoided the injury, the option would have been taken. In determining the reliability of the plaintiff's evidence and jurisdictions where the subjective test operates, therefore, demeanour can play little part in accepting the plaintiff's evidence. It may be a ground for rejecting the plaintiff's evidence. But given that most plaintiffs will genuinely believe that they would have taken another option, if presented to them, the reliability of their evidence can only be determined by reference to objective factors, particularly the attitude and conduct of the plaintiff at or about the time when the breach of duty occurred."

[183] To similar effect is the statement of Callinan and Heydon JJ in *Vairy v Wyong Shire Council*:[264]

> "In *Rosenberg v Percival*, Callinan J referred to the very limited utility, indeed practical uselessness, of reliance by a court upon an answer by a plaintiff denying that he or she would have run a particular risk had he or she known about it. Her Honour here did not rely simply upon such a denial. Quite properly, she looked to supporting objective factors such as an innate cautiousness on the part of the appellant, and his awareness of a serious accident in water in which a relative had suffered injury. We are not convinced that these factors provide a complete answer to the essential anterior question, whether the appellant would have actually seen or read the contents of the sign or signs on the day, however many there were and wherever they were located."

[184] The defendant refers to a number of objective factors in support of its submission that the plaintiff's evidence in respect of causation should be rejected. First the defendant submits that the plaintiff, having used the pool for an extended period prior to her injury, any signage would not have informed her of any matter of which she could have been unaware. This submission, in my view, is more relevant to the causative effect of depth markers rather than of a "no diving" sign. Such a sign would have informed the plaintiff that diving was prohibited. Whilst a 12 year old child may appreciate the varying depths

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[262] Defendant's Submissions, [18].
[263] (1998) 195 CLR 232 at 246, footnote 64.
[264] (2005) 223 CLR 422 at 226.

of a pool by playing in it does not necessarily mean that the child would also appreciate the dangers of diving into the pool.

[185] The defendant further submits that the plaintiff may not have understood any signage in pictogram as prohibiting diving: [265]

> "Importantly, in this case the Plaintiff was 12 years of age and in 1998, signage in pictogram form was not common and unlikely to be understood by her or fully understood. The first of those signs in Mr McDougall's report could be interpreted as a caution against diving at an acute angle, rather than a prohibition on diving per se. That second sign if present on the day might be seen to have encouraged diving and to warn against the obvious risk of a deep dive, as discussed by McMeekin J.[266] A myriad of signs in script would probably be seen by an adolescent as overly restrictive (even if read) and unlikely to be followed in respect of an activity in which she was proficient and in which she was determined to engage."

[186] I do not accept this submission.

[187] Mr McDougall referred to research which showed that generally it was not a problem for school-age children to readily understand what these type of signs meant.[267] Australian Standard 2416 provides guidance on the design and application of water safety signs. The foreword to this Standard describes how the symbolic signs included in the document have been tested for comprehension in accordance with Australian Standard 2342 and are recommended to be used without words. Australian Standard 2342 is entitled "Development, Testing and Implementation of Information and Safety Symbols and Symbolic Signs".[268]

[188] The defendant also points to the fact that the alleged causative effect of the "no diving" sign was not raised in the plaintiff's Notice of Claim dated 25 February 2003 under the *Personal Injuries Proceedings Act* 2002.[269] Item 16 of the Notice of Claim states: [270]

> "16 DETAIL THE REASONS WHY THE INJURED PERSON BELIEVES THAT PERSON CAUSED THE INCIDENT
>
> …
>
> - POOL WAS NOT SUFFICIENT IN DEPTH TOP PREVENT DAMAGIN HEAD IMPACTS FROM NORMAL DIVES;
> - NO DEPTH MARKERS;
> - NO INTERIOR LINING PATTER OR OTHER CUES;

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[265] Defendant's Submissions, [26].
[266] See *Kelly v State of Queensland* [2013] QSC 106 at [35] and [69] per McMeekin J.
[267] T2-30, lines 28 to 31.
[268] Exhibit 3, page 13.
[269] Exhibit 14.
[270] The reference to "Failing to Provide a Non-Slip Surface Around the Pool" concerns a deleted allegation in paragraph 9.2 of the Second Further Amended Statement of Claim that the plaintiff slipped on the coping around the edge of the pool and converted her fall into a dive.

- NO WARNING SIGNS WHICH WOULD HELP DISCERN THE VARYING WATER DEPTHS;
- FAILING TO PROVIDE A NON-SLIP SURFACE AROUND THE POOL."

Whilst Item 16 does not specifically identify a "no diving" sign, it does make reference to there being no warning signs which would help discern the varying water depths. This is in addition to there being no depth markers. This description is in my view sufficiently general to encompass a "no diving" sign as one such warning sign.

[189] The primary objective fact relied upon by the defendant in rejecting the plaintiff's evidence, is the plaintiff's pre-accident disposition. I have considered this evidence above.[271] The defendant submits that even if there had been a "no diving" sign the plaintiff, because of her oppositional nature, would not have obeyed it.[272] She did not accept boundaries imposed upon her activities either by her parents or later by hospital staff in enforcing hospital rules.[273]

[190] The present case is not one where the plaintiff was instructed not to dive into the pool. There was no sign prohibiting diving. Carol Lennon gave no instruction to the plaintiff not to dive into the pool. Her instructions are set out in [80] above. Carol Lennon's concern was to make sure that the plaintiff and her younger sister were not "jumping or, you know, splashing or upsetting anyone else at the pool".[274] Whilst it was Ms Balmanno's practice to instruct children (including the plaintiff) to enter a pool in the feet first method by sliding in,[275] prior to executing any dive into the motel pool the plaintiff had already been playing in the pool for approximately 20 minutes. The plaintiff was not injured as a result of immediately diving into the pool without any appreciation of its depth.

[191] The present case is therefore to be distinguished from other cases where there has been a clear history of wilful disobedience. In *Hornberg v Horrobin & Anor*[276] Ambrose J considered the issue of causation in the context where the plaintiff and other children were "well aware that they were forbidden to run around the edge of the pool or to cut corners": [277]

> "Indeed they had been told to stop engaging in those very activities only an hour or so before the plaintiff's injury. It is clear that having been given the warning, as soon as the first defendant turned his back to go into the kiosk area they recommenced and continued to play those games until as Bernadette Osborne observed they 'got tired of it'.
>
> I am simply unpersuaded that the erection of signs around the swimming pool prohibiting playing the game of 'cut the corner' would have been any more

[271] "The plaintiff's character", [64] to [75].
[272] Defendant's Submissions, [1(b)], [3], [5] and [15].
[273] Defendant's Submissions, [5(a)].
[274] T1-90, lines 8 to 10.
[275] T2-46, lines 21 to 22.
[276] [1997] QSC 207.
[277] [1997] QSC 207 at [69]-[70].

> effective to dissuade children from diving across the corners of the pool than had been the constant prohibition of that game whenever the first defendant became aware that it was being played. It is clear from the evidence of the children that they would play the game when they thought they could get away with it in the absence of the first defendant from the immediate environs of the pool."

[192] The defendant identifies, as an instance of the plaintiff's disobedience to signs, her remaining in the motel pool with Letitia after Mr Mulcahy had left. The defendant submits that the plaintiff was knowingly in the pool in breach of the gate sign requiring adult supervision. This submission should be rejected. It is quite a different matter for the plaintiff to have remained in the pool with her younger sister in circumstances where her mother left Letitia under the plaintiff's supervision. This arrangement of the plaintiff looking after Letitia was one of longstanding. Although there were adults in the pool when the plaintiff and Letitia were left there by their mother, Carol Lennon did not instruct the plaintiff that she was to cease using the pool when those adults left. It is therefore a different matter for the plaintiff to have remained in the pool after Mr Mulcahy left compared to the plaintiff deliberately ignoring a sign prohibiting diving.

[193] As I have already observed, Dr Ljubisavljevic was not called to give evidence at trial. Her notes in summarising what she was told by Carol Lennon remain unexplained by Dr Ljubisavljevic. Her note that Carol Lennon told her that the plaintiff was "oppositional to parents" should be read in the context of the plaintiff's mother's explanation:

> "As long as the why was answered properly she was quite happy but she did ask why."[278]

Any suggestion that the plaintiff was "oppositional" must also be tempered with other evidence demonstrating that the plaintiff was a responsible 12 year old. This evidence includes her school reports referred to in [29], her supervision of her sister and others referred to in [30] to [34] and [41] to [44] and her work experience prior to 21 February 1998 referred to in [35] to [40] above. There is also the evidence that when the plaintiff travelled to a mine site in the truck with her father she was mindful of abiding by the rules, including those that required her to stay in the vehicle to avoid the risk of injury to herself or others.[279] The evidence taken as a whole shows that the plaintiff was a mature and responsible child who would ordinarily follow directions. Her post-accident behaviour, given that she had suffered a traumatic and life-changing injury, cannot be used as a true indicator of her pre-accident behaviour.[280] To the objective facts which I have already identified should be added the direct eye-witness accounts of the plaintiff's observed behaviour at the motel pool on 21 February 1998. Ms Phillips' evidence-in-chief was that the plaintiff and her younger sister were very well behaved. They were very quiet and just walking around.[281] Similarly, Mr Mulcahy's evidence was to the effect that the girls were not doing anything untoward.[282]

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[278] See [70] above; T1-97, lines 10 to 13; T1-99, lines 33 to 35.
[279] See [39] above; T1-36, lines 20 to 30.
[280] Plaintiff's Submission, [91].
[281] T3-20, lines 31 to 32.
[282] See [102] above and T1-73, lines 4 to 24. This behaviour should be contrasted with that of the plaintiff in *Scarf v State of Queensland & Council of the City of Gold Coast* [1998] QSC 233. In that case the plaintiff had a history of defiance of authority and lawlessness together with the impetuous nature of his decision to dive off

[194] When the plaintiff's evidence in respect of causation is considered in the light of the objective facts which I have identified, I find that the plaintiff would not have dived into the pool and therefore not have hit her head on the bottom of the pool if a "no diving" sign had been in place. The sign could either have been Sign 213 or Sign 228 referred to in Mr McDougall's report[283] or the simple "no diving" sign that was installed at the motel pool after the incident. My finding as to causation does not however extend to depth markers. First, the questioning of the plaintiff in respect of causation was limited to the absence of a "no diving" sign and did not include any reference to depth markers. Prior to executing the dive that caused her injuries the plaintiff had used the pool for an extended period of approximately 30 to 40 minutes. I accept the defendant's submission that in that period she would have gained an appreciation of the pool's depths.[284] The plaintiff would not therefore have gained any additional depth information from depth markers if present. Counsel for the plaintiff conceded the difficulty of submitting that depth markers would have definitively change the position because the plaintiff had been in the pool for an extended period.[285] This concession is consistent with Mr McDougall's acceptance in cross-examination that depth markers would convey no additional information to a person who knew the pool's depth.[286] Although depth markers would constitute an ongoing reminder to users of the pool, as a matter of causation, the plaintiff's injuries arose from a dive from the deep end of the pool. In such circumstances it cannot be said that the absence of depth markers had any causative effect in respect of the plaintiff's injuries.

Contributory Negligence

[195] The plaintiff submits that a reasonable reduction for contributory negligence is 10 per cent. This is because any contributory negligence on the part of the plaintiff would be relatively insignificant given her age, the lack of signage and the failure of the defendant to take any steps to warn people of the risk.[287] The defendant submits however, that the plaintiff's contributory negligence is substantial and that despite her age, a finding of at least 50 per cent contributory negligence would be appropriate in all the circumstances.[288] In *Podrebersek v Australian Iron & Steel*[289] the High Court explained the relevant principles:

> "The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man … and of the relative importance of the acts of the parties in causing the damage … It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination." (Citations omitted).

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the Tallebudgera Creek Bridge striking his head on a shallow sand-bar, rendering him a tetraplegic; see also *Wilkins v Council of the City of Broken Hill* [2005] NSWCA 468.

283 Exhibit 3, page 13.

284 Defendant's Submissions, [1(g)].

285 T3-62, lines 10 to 13.

286 T2-29, lines 16 to 27.

287 Plaintiff's Outline of Argument at Trial, [122] to [123].

288 Defendant's Submissions, [38].

289 (1985) 59 ALJR 492 at 494.

[196] In the present case the plaintiff was a child of 12 years and 9 months at the time of the incident. In *McHale v Watson*[290] Kitto J stated:

> "In those things normality is, for children, something different from what normality is for adults; the very concept of normality is a concept of rising levels until "years of discretion" are attained. The law does not arbitrarily fix upon any particular age for this purpose, and tribunals of fact may well give effect to different views as to the age at which normal adult foresight and prudence are reasonably to be expected in relation to particular sets of circumstances. But up to that stage the normal capacity to exercise those two qualities necessarily means the capacity which is normal for a child of the relevant age; and it seems to me that it would be contrary to the fundamental principle that a person is liable for harm that he causes by falling short of an objective criterion of "propriety" in his conduct - propriety, that is to say, as determined by a comparison with the standard of care reasonably to be expected in the circumstances from the normal person - to hold that where a child's liability is in question the normal person to be considered is someone other than a child of corresponding age."

[197] The question therefore is whether the plaintiff has failed to exercise that degree of care for her own safety which might reasonably be expected of an ordinary child of the same age. The test to be applied is an objective one and is "the standard to be expected of a child, meaning an ordinary child, of comparable age … not that which is to be expected of an adult".[291]

[198] In *Simpson v Grundy*[292] Dalton J, in considering the contributory negligence of a plaintiff aged 17, referred to *Shellharbour City Council v Rigby*:[293]

> "… the New South Wales Court of Appeal refused to interfere with an apportionment of 20 per cent contributory negligence made against a 14 year old plaintiff who, disobeying her parents, went to the BMX bike track by herself and was injured. No greater apportionment was made because, "the plaintiff was young and behaving in a way typical for persons of her age – exhibiting … a type of spontaneous and/or reckless behaviour typical of children of that age."

Dalton J made an overall apportionment of 30 per cent against the plaintiff, noting that had the plaintiff been a mature adult this apportionment would have been 50 per cent.

[199] The plaintiff, whilst only 12 years old, was a mature and responsible child. She had a general awareness of the dangers associated with diving.[294] She knew not to dive into shallow water or pools in which she could not judge the depth.[295] I have found that the plaintiff was injured when she executed a dive from the deep end of the pool towards the shallow end. She did not dive into the shallow end of the pool. She had however been

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[290] (1966) 115 CLR 199 at 213 to 214.
[291] (1966) 115 CLR 199 at 215 per Kitto J.
[292] [2013] 2 Qd R 384 at 399.
[293] (2006) 150 LGERA 11 at 37 to 38, in [106] to [111].
[294] See [50] and [52] above.
[295] See [55] above and Exhibit 19.

diving safely into the pool without incident for approximately 10 to 15 minutes prior to executing the relevant dive. She had been playing in the pool for a longer period of approximately 30 to 40 minute and appreciated the varying depths of the pool.

[200] No one witnessed the dive. There is therefore no direct evidence as to the type of dive which the plaintiff executed. The dive must have been of sufficient depth and angle so as to result in the plaintiff's head hitting the bottom of the pool.

[201] The defendant referred to *Felhaber v Rockhampton City Council*[296] where McMeekin J considered contributory negligence in the context of a diving accident of a 17 year old plaintiff:

> "The plaintiff made a mistake in his dive – I suspect that his swing took him not so far out as was usual and his chosen method of dismount brought him a little closer to the bank than he expected. It was not a deliberate action of courting a risk but a negligent failure to ensure he kept a safe distance away from the bank. That should have been his primary concern. That negligence was of significant causative potency whilst the degree of departure from the standard of a reasonable man was not so great. I do not see the plaintiff's age as particularly relevant in this assessment.
>
> I assess the notional apportionment at 50%."

[202] In *Felhaber* the plaintiff had been swinging on an improvised rope swing from the bough of a tree into the Fitzroy River in the company of some friends. On his last swing he dived head-first into the water, struck his head on the river bed and, effectively, broke his neck.[297] This is a very different activity to that carried out by the plaintiff in the present case. Here the plaintiff executed a dive into the deep end of a motel pool which had no signage prohibiting diving. The plaintiff miscalculated this dive because her head struck the bottom of the pool. Given that the plaintiff knew of the dangers of diving it may be accepted that she failed to take reasonable care for her own safety. I assess her apportionment at 15 per cent. Had the plaintiff been a mature adult I would have made a higher apportionment in the order of 25 to 35 per cent.

Disposition

[203] The liability of the defendant to pay the plaintiff's damages should be apportioned as to 85 per cent against the defendant and 15 per cent against the plaintiff.

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[296] [2011] QSC 23 at [117].
[297] [2011] QSC 23 at [1] per McMeekin J.