Victoria Registry
CA161/83

Court of Appeal

BETWEEN:

FREDERICK GERAK, JR.

PLAINTIFF
(RESPONDENT)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AND THE HONOURABLE THE MINISTER OF THE DEPARTMENT OF LANDS, PARKS AND HOUSING

DEFENDANTS
(APPELLANTS)

REASONS FOR JUDGMENT

OF THE HONOURABLE

MR. JUSTICE MACFARLANE

Before: The Honourable Chief Justice Nemetz
The Honourable Mr. Justice Seaton
The Honourable Mr. Justice Macfarlane

Counsel for the Appellants: W.A. Pearce, Esq. and A.K. Fraser, Esq.

Counsel for the Respondent: J.N. Laxton, Esq. and Nathan Smith, Esq.

Vancouver, British Columbia
December 11, 1984

The appellants appeal from a judgment holding them liable for breach duty as an occupier of premises. The trial judge held them liable for failing to take that care that in all the circumstances of the case is reasonable to see that a person on the

premises will be reasonably safe in using the premises. The trial judge apportioned the negligence, finding the appellants to be 35% at fault, and the respondent 65% at fault for his injuries. The appellants contend that the evidence did not support a finding of any negligence on their part, and the respondent cross-appeals, contending that there was error in assessing the fault of the respondent at 65%.

On July 26th, 1981 the respondent Gerak suffered spinal injuries and paralysis as a result of hitting his head on the bottom of Cultus Lake after diving from a public wharf located in a provincial park for which the appellants carry responsibility.

The wharf, or narrow pier, extended 125 feet from the beach out into a lake where it is connected to a float, running a further 30 feet out into the lake. A line of red and white corks was attached to the beach side of the float and was placed at an angle to the beach, marking an area within which people could wade and swim. The water was shallow within this area, being an inch or so at waters edge and about 3 to 4 feet at the place where the cork line was attached to the float. On the day in question the beach was very crowded, the water was murky and you could not see the bottom as you proceeded along the wharf or pier from the beach to the float. The wharf or pier was very crowded and Gerak had to weave in and out through the people as he proceeded towards the float. There were "wall to wall" people within the corked area, and there were many people on the float.

Gerak arrived at the beach with some friends. Gerak's party proceeded to a place near the start of the pier and placed a blanket on the beach. Gerak, who was already wearing his swim suit, removed his shoes and then proceeded in a slow jog onto and

along the wharf through the crowd. He was followed by a friend Robin Pallos and another friend, Ray Hurley. Part way along the pier, the judge estimated it at about four-fifths of the way along the 125 foot wharf, Gerak dove into the water on the right side of the pier. Gerak had never been on that pier before and was unaware of the depth of the water. As he dived he passed in front of two people, Dennis Lee and Sita Houwelling, who were sitting on the edge of the wharf. When Gerak's body came to the surface he was floating as if injured. Miss Houwelling thought he was joking because she was not aware that the water was shallow enough for him to suffer any injury.

Robin Pallos, on the other hand, who was about six feet behind Gerak realized as Gerak dived that there was danger and called to him not to dive. It was too late. Pallos apparently realized it was unsafe because he had seen people standing in the shallow water. Gerak testified that he was unaware of persons standing in the water, and it appears that Sita Houwelling was unaware of that fact as well.

The appellants and the respondent agree that, in fact, the water within the cork line was too shallow for safe diving.

There were no signs or notices of any kind posted on or near the wharf that prohibited diving or jumping from it or warned of hazard in doing so. The only sign posted was a few feet to the right of the wharf near the water's edge. It cautioned visitors that lifeguards were not in attendance, that children should not be left unattended, and that there was an extreme drop-off beyond the corks. Gerak did not see this sign as he moved from the beach onto the wharf. On the deck of the wharf itself the words "No

Running" were stenciled. Gerak did not see these words as he jogged along the wharf. There were no other signs or notices relating to activity on or near the wharf, nor were there any water depth markings on it, or in the vicinity.

There was a further swimming and diving area outside the cork line. People would enter this area from the float, which was further out into the lake than the wharf. There was a line of buoys placed in the lake well out from the float so that people could safely swim and dive between the float and those buoys, which marked an area that speed boats and other craft could not enter.

The Crown contended at trial, and before us, that what Gerak should have recognized was that the water between the cork lines and the shore was for wading, and for use by non-swimmers, while the water between the cork line and the buoys was for swimming. It was submitted that he should have realized that the float, which lay beyond the cork lines, was for diving, and if he had looked before he leaped he would surely have observed people standing in the water who served, as it were, as human depth markers. The trial judge rejected those contentions, referring to evidence that the water around the wharf was undoubtedly a hive of aquatic activity on the day in question. The trial judge said that the throngs of people in the water would have tended to distract attention from the floating markers which the Crown asserted were to designate distinct areas for non-swimmers, for swimmers and divers, and for boats. The trial judge said he was not satisfied that someone coming to the beach from the parking lot, in such circumstances, would be sure to see the cork lines and buoys, and to draw the conclusion that the former enclosed water was not deep enough for diving. He said that the crowded conditions which prevailed that day, and the variety of activities

engaged in by people in the water "may also go some distance towards explaining why Gerak failed to observe persons standing in the area of his dive, from which he would necessarily have realized the shallowness of the water".

The Crown submits that there was no evidence to support such a finding by the trial judge. After having reviewed the evidence carefully, I have concluded that it was open to the judge to draw the inference that Gerak may have failed to see people standing in the water because there were so many people engaged in so many different activities that those standing in the water were lost in the crowd.

A companion submission is that the trial judge erred in accepting the evidence of the respondent:-

1. That he dived from the wharf at a point about four-fifths of the way from the beach to the end of the pier.

2. That he believed that the area inside the cork line was the entire swimming and diving area because there were boats beyond the cork line.

On the first point the trial judge had this to say:-

> "The wharf is about 125 feet long. Attached to it by a gangway is a float, a little more than 30 feet in length, extending out into the lake. At intervals along the wharf there are three pairs of ladders attached to its sides, with the third pair (that is, the pair furthest from the beach) being about 100 feet from the landward end of the wharf. Gerak's own recollection is that he dove from a point very close to the third ladder on the right side, being about 25 feet short of the gangway leading to the float. The testimony of eye witnesses on this subject differed to some extent, but not greatly, with the locations marked by them on a sketch indicating points of take-off within some 10 feet in either direction. It is unnecessary to fix exactly the point at which Gerak left the wharf or where he entered the water. The lake bottom along this section

> of the wharf falls away very gently, so that water depth between the most widely separated points identified by the witnesses would not have differed by more than a few inches. There was a good deal of evidence concerning water depth and water level in relation to the wharf on the date of the accident, and again some variance in the testimony. The gist of the evidence is that the distance from the deck of the wharf to the surface of the water was between two and three feet and that the water at the point Gerak entered it was about three feet deep, give or take a few inches. Greater provision is unnecessary for it is abundantly clear, and conceded on all hands, that the water there was too shallow for safe diving."

Having read the evidence in the light of the submissions made, I agree with the trial judge that greater precision in fixing the point at which Gerak left the wharf was unnecessary. If Gerak left the wharf where he said he did he was 100 feet from the beach. If he left at the point which the appellant says is supported by other evidence then he was 91 and 1/4 feet from shore when he dived. Whichever evidence was accepted there was still a reasonable basis, as the trial judge appears to have found, for the respondent assuming that the further along the wharf he got the deeper the water would be, and that it was probably safe to dive at that point on the pier. Whether he was 91 feet or 100 feet from shore when he dived he might have had the impression that it was safe.

On the second point it is important to realize that the main reason given by the respondent, when testifying in chief, was that he thought the water would get deeper the further he went, that he could not see the bottom, and that he took it to be deep enough when he dived. It was only in cross-examination, in answer to a leading question, that he agreed he had assumed from the presence of boats outside the corked area that the waters inside constituted the entire swimming area. Although the judge repeated the evidence of the respondent about the presence of boats, when in fact no

one else saw any in the vicinity, I am not persuaded that he placed much, if any, weight on the evidence of the presence of boats. Instead I think the emphasis was on the appearance of safety presented by the physical configuration of the dock facilities, and the absence of any warning of the hazard of diving into the water inside the corks.

I am not persuaded that the trial judge fell into any reversible error on those questions.

The Expert Evidence

The appellants submit that the opinion evidence of Irene MacDonald and Janice Engemoen ought not to have been admitted or accepted because:-

1. The opinions expressed were outside their field of expertise.

2. The trial judge could have formed a correct judgment without the assistance of persons with special knowledge.

3. The opinions were based on an incorrect assumption.

The opinions expressed by the witnesses are revealed by this extract from the judgment:-

> "Both Ms. MacDonald and Ms. Engemoen considered that a wharf in an area such as this constituted an open invitation for jumping and diving. If a wharf is to be located in such an area intended for both swimmers and non-swimmers, both witnesses felt that safety precautions should include, or feature some combination of prominent signs warning against diving, supervision by lifeguards, depth markers, and, possibly, some sort of guardrailing along the sides of the wharf".

Later in the judgment the trial judge said that the two witnesses had testified that "members of the public will sometimes dive into water without knowing its depth. This is a problem which can be addressed by various means, such as signs prohibiting diving, depth markers and supervision by trained lifeguards".

In permitting the witnesses to give expert evidence the trial judge had said that what the witnesses had to say might be relevant to the ultimate issue in the case but would certainly stop short of deciding that issue. He said that the proposed evidence appeared to have relevance in at least two areas. "Someone with many years of working experience in such a facility may be better situated than a lay person who spends little or no time in such facility to testify as to either comparable facilities or as to how people behave in those facilities." He concluded that the testimony of experts with regard to those areas might be of assistance to the Court.

In dealing with the expertise of the witnesses, the trial judge in his judgment said that Ms. MacDonald had been an international and olympic level competitive diver, a diving coach and that she presently operated her own sports consulting firm. The evidence shows that Ms. MacDonald has been a diving coach since 1960. Her company coordinates the work of instructors and diving clinics. It acts as a consultant in respect to the design and layout of diving areas. It acts as a consultant concerning diving facilities and their safety. She testified in the Bisson case and in the LeBlanc case. Although each of those cases had to do with diving accidents in outdoor facilities, Ms. MacDonald's work is directed mostly towards activities in indoor pools.

In the judgment the expertise of Janice Engemoen was described in this way:-

> "Ms. Janice Engemoen has wide experience in aquatics and water safety. For the last decade she has been Director of Water Safety Service for the B.C. - Yukon Division of the Canadian Red Cross Society and in the course of her work over the years she has visited most public swimming facilities, indoor and outdoor, in British Columbia."

The evidence justifies the wide experience attributed to her by the judge.

I am not persuaded that the opinions expressed by these witnesses were outside their field of expertise and I do not think the trial judge erred in deciding that these witnesses were persons with special knowledge who would be of assistance to the Court in considering the matters in question in this action. Each of the witnesses when viewing or being told of the design of the facilities were able to identify the potential hazard to the users of those facilities, and to explain the safety precautions which would have been reasonable in all the circumstances.

The appellants submit that the evidence of Ms. MacDonald and Ms. Engemoen should have been rejected on the basis that their opinions were premised on an incorrect assumption, namely that boats would be present between the cork line and the buoys.

It is true that the evidence of Ms. MacDonald proceeded on the basis that the area inside the corks was the safe swimming area. But the focus of her study of the facilities was not on what was happening outside the cork line, but rather on activities inside it and on the wharf itself. She was aware that boats were cruising outside the buoys and that there were swimmers between the corks and the buoys, but this did not play a material part in her consideration of the question she had been asked, as an examination of her evidence reveals.

She inspected the facilities, and as she walked on the dock she did not realize how shallow the water was inside the corks. Her first impression was that she could dive safely in that water. It was not until she tested the depth by having a person stand in the water that she was aware of the hazard. It was that first impression which gave rise to her concern about the safety of the facility. It was her opinion that the general public using a marked area at waterfront facilities assumes that the area is safe to use. A wharf or a raft is an open invitation for usage. She noticed that there were no signs informing the public that the water was shallow inside the corks or that they should not jump or dive off the wharf. Having observed the facility she said that an ordinary person would assume that it would be safe to dive from the wharf at a point 40 to 50 feet from the beach unless there was something to indicate that the water was shallow. In her experience members of the public are prone to dive into water without knowing its actual depth. Knowledge of that risk dictates the need for supervision, for clear markings on the wharf as to the depth of the water, signs to indicate the area where diving is allowed, and where it is not allowed, and when the water is too shallow for diving or jumping, signs to warn the users of that hazard. All of those observations focus on the wharf and the area inside the corks, and as I understand her evidence, apply whether there is swimming and diving from some other float or not. Any misconception of the intention of park officials in marking different areas for different uses is not therefore of any consequence.

Ms. Engemoen was instructed by the respondent's solicitors that Gerak had the impression that the area beyond the corks was for boats and that the area inside the corks was for swimming and diving.

Her opinion, in direct examination, does not seem to be based on that assumption. Rather, the focus is on the presence of a wharf near to a designated bathing area. She said that a wharf is an open invitation to swimmers to dive. There is no other logical way to get off a wharf other than to dive or jump. Swimmers would rarely climb down a ladder to enter the water. She emphasized that it is reasonable to assume, when on such a wharf, that beyond the mid-point and certainly at a point 91 feet or more from the beach that the water is likely to be deep enough for diving. If the water is too shallow for safe diving, then it was an absolute safety requirement that signs indicating the depth of the water, and signs warning swimmers not to dive be painted right onto the wharf.

In cross-examination Ms. Engemoen would not agree that her opinion would have been different if she had known that boats were not permitted between the buoys and the float, and that such area was intended for swimming and diving. As I understand her evidence, a member of the public would not immediately draw a distinction between the two areas, but, seeing the cork line from the beach to the float, would assume that the area inside the corks was a safe swimming area, and that it would be safe to swim or dive because the two activities go together.

In the result, I am not persuaded that the opinions expressed by these witnesses would have been any different had they proceeded clearly on the assumption that it was intended that good swimmers use the waters between the float and the buoys for swimming and diving.

The appellants then submit that the trial judge erred in accepting the evidence of Irene MacDonald that she saw people jumping from the wharf while at the same time implicitly rejecting, without reasons, the evidence of defence witnesses who had all said that they had never seen anyone dive or jump from the wharf.

In dealing with the evidence, the trial judge mentioned that Gerak did not recall having ever seen anyone dive or jump from the wharf. The judge went on to say that evidence concerning this matter was sketchy. He noted that park officials did not have any knowledge of people diving or jumping from the wharf. He mentioned that Ms. Houwelling and Mr. Hurley had observed people diving from the wharf itself, around its end and out towards the lake. Finally, he said that Ms. MacDonald had testified that she had seen people jumping off both sides of the wharf. The trial judge did not say what parts, if any, of that evidence that he accepted or rejected. He merely recorded that the evidence had been given. More importantly, his judgment does not turn in any way on a finding that the defendants knew or ought to have known that users of the facility were diving or jumping from the wharf. Instead the judgment appears to turn on evidence from which the judge was entitled to find that the pier presented an invitation to dive and that in the presence of such a risk certain safety precautions were required. The appellants concede that this was the point upon which the case turned. In their factum they submit that the central issue in this case is whether this pier on this particular day presented an invitation to an ordinary reasonable user of the age and intelligence of Gerak to dive into the wading area. They concede that if, on an objective test of reasonableness, it could be said that the pier in question gave a misleading appearance of safety such that an ordinary reasonable user would have had reason to believe it was safe to dive in the area in

question that it would be open for the Court to find liability against the Crown. It appears to me that that is exactly what the trial judge found in this case. He accepted the evidence of the expert witnesses that an ordinary person proceeding down the pier or wharf, being at a point 90 to 100 feet from the beach, and not being able to see the bottom because the water was murky, would have reason to believe that the area enclosed within the cork line was a safe place to swim, and would think that if it was safe to swim then it was safe to dive as well. Such an ordinary user would expect that the water would be deeper further from shore, and that it ought to be sufficiently deep for diving at a distance of 90 to 100 feet from the shore. In the absence of any signs to warn the user of any danger, he would view the wharf as a place from which he could enter the water. An ordinary user would in such circumstances enter the water by jumping or by diving.

On that basis the trial judge was entitled to find that there had been a breach of the duty of care prescribed by the statute.

It is then submitted by the appellants that the trial judge erred in saying that foreseeability of risk, despite the statutory duty, was still an element of importance in determining occupier's liability. The appellants submit that "it is not enough to say that someone may jump off the wharf. The judge must say it is foreseeable that a reasonable person would jump off the wharf." By accepting the evidence of the Crown witnesses, the judge found that it was foreseeable that an ordinary person, like Gerak, using the premises in such circumstances would be led to believe it was safe to dive. It follows that in such circumstances that the occupier had failed to take reasonable care to see that Gerak would be reasonably safe in using the premises.

The appellant then submits that they are absolved from any liability by reason of the provisions of s.3(3) of the Occupiers Liability Act which provides:-

> "(3) Notwithstanding subsection (1), an occupier has no duty of care to a person in respect of risks willingly accepted by that person as his own risks."

I cannot agree with that submission. If the risk of harm had been so clearly obvious to the respondent when he dived from the wharf then it might be said that he had willingly accepted the risk. I do not think that the willing acceptance of a risk can be equated to "taking reasonable care for one's own safety". The former involves acceptance of the legal risk and the latter negligence resulting in an apportionment of liability.

I think the dicta of Laskin, J. (as he then was) in Mitchell et al. v. Canadian National Railway Co. (1974) 46 D.L.R. (3d) 363 at 379-380 is apposite. He said:-

> "I do not think it is any longer proper to hold that mere knowledge of likely danger is any more exonerative of a licensor than of an invitor. Long before the House of Lords decided London Graving Dock Co. Ltd. v. Horton [1951] A.C. 737, the judicial committee in a Canadian appeal, Letang v. Ottawa Electric Railway Co. [1926] 3 D.L.R. 457, [1926] A.C. 725, 41 Que. K.B. 312, had held that mere knowledge of the danger by an invitee was not enough to absolve an invitor of liability where such knowledge fell short of voluntary assumption of risk. The holding in the Horton case to the contrary was not followed by this Court in Campbell v. Royal Bank of Canada (1963) 43 D.L.R. (2d) 341, [1964] S.C.R. 85, 46 W.W.R. 79, where Spence, J., speaking for the majority, referred at p.353 to the fact that 'The defendant has failed to show such knowledge as to leave the inference that the risk had been voluntarily encountered', citing the Letang case and Osborne v. London and Northwestern R. Co. (1888) 21 Q.B.D. 220 at p.223.
>
> I regard it as wrong in principle to dissolve a duty of care that arises on the facts of a case merely because the person to whom the duty is owed knows that he may be exposing himself

> to some danger, and especially so when there is applicable apportionment legislation. It has been held by this Court that such legislation is as applicable to occupiers' liability as to other cases of liability founded upon negligence: see Brown and Brown v. B. and F. Theatres Ltd. [1947] 3 D.L.R. 593, [1947] S.C.R. 486."

I think that in this case the respondent should be taken to have had knowledge of a likely danger, but that such knowledge fell short of a voluntary assumption of risk. The provisions of s.3(3) would not therefore, in my opinion, absolve the defendants of liability. It was a proper case, in my view, for an apportionment of liability.

Two issues raised by the appellants on this appeal may be conveniently dealt with together. The appellants submit that the trial judge erred in finding that the facilities were not reasonably safe by reason of the fact that lifeguards were not present and submit further that there was error in failing to make any causal connection between the deficiencies in safety as found by him and the injuries sustained by the respondent.

Those submissions arise out of this finding by the trial judge:-

> "Ms. MacDonald and Ms. Engemoen testified that disregard for personal safety is a well-known problem for persons working in the fields of aquatics and water safety, and it is unfortunately the case that members of the public will sometimes dive into water without knowing its depth. This is a problem which can be addressed by various means such as signs prohibiting diving, depth markers and supervision by trained lifeguards. Here, despite the fact that the wharf was used solely as an adjunct to swimming and diving activities, none of these precautions were taken. Having endeavored to consider 'all the circumstances of the case', as directed by s.3(1), I find that the Crown did not exercise that degree of care that in all the circumstances of the case was reasonable."

That finding must be read in conjunction with what the trial judge said earlier in reviewing the evidence of the two expert witnesses:-

> "Both Ms. MacDonald and Ms. Engemoen considered that a wharf in an area such as this constituted an open invitation for jumping and diving. If a wharf is to be located in such an area intended for both swimmers and non-swimmers, both witnesses felt that safety precautions should include, or feature some combination of, prominent signs warning against diving, supervision by lifeguards, depth markers, and, possibly, some sort of guardrailing along the sides of the wharf. None of these were to be found at Cultus Lake.
>
> I am of the view that there is merit in their observations. The wharf in question differs from those found in most other recreational facilities, developed or undeveloped, in one important respect. -- It is an integral part of what has been developed exclusively as a swimming area, and one which is very heavily used for this purpose. As such, one might reasonably expect safety precautions to be taken that may not necessarily be called for in the case of a wharf evidently intended to serve as a dock."

The appellants concede in their factum that the central issue in this case is whether this pier on this particular day presented an invitation to dive. I think the trial judge was entitled to find in favour of the respondent on that issue. When such a finding had been made it was not necessary to establish whether one or some of the suggested precautions might have prevented the accident. It was relevant to note that none of these precautions had been taken. If some or all of the precautions had been taken by the defendant then the duty of care may have been satisfied. But the presence of the hazard, and the absence of any such precautions was a proper basis for finding liability.

Furthermore, the trial judge did not say that all of these precautions should have been taken. What he did say is that a problem of this type can be addressed by various

means, including those which he mentioned. On the basis of the expert evidence in the case and having regard to the circumstances, the minimum and relevant precaution which should have been taken would have been the presence of prominent signs, probably painted on the wharf itself, prohibiting diving from the wharf and warning of the danger of shallow water inside the corks.

The respondent cross-appeals against the apportionment of liability, 65% of fault being attributed to the respondent and 35% of fault being attributed to the appellants, and submits that the apportionment should be varied to 80% at fault attributed to the appellants, and 20% to the respondent.

The trial judge gave these reasons for apportioning fault:-

> "As noted at the outset, it was conceded that Gerak was partly at fault, so the remaining question is simply one of apportionment of fault pursuant to s.1 of the Negligence Act. A cardinal rule of water safety is that one ought not to dive into waters of unknown depth. Gerak violated this precept. A character of his negligence scarcely needs further elaboration. He had never been to this site before and yet he failed to take any steps to ascertain the depth of the water before launching into his dive. He operated on the basis of an assumption which, sadly, was unfounded. In my view, the major responsibility for the accident is his. I apportion fault 65% to him and 35% to the Crown".

The respondent submits that the trial judge misapprehended the evidence in reaching that conclusion. That is tantamount to saying that there was "palpable and overriding error" affecting the assessment of fault, or to put it more succinctly, that the judge was clearly wrong in reaching that conclusion. The respondent submits that the first error of the trial judge was in failing to find that park officials knew that people had been diving from the wharf into shallow water, and had failed to take any prompt

action to prevent it. There was no evidence that park officials knew that people had been diving from the wharf, and the judge so found. There was evidence that park officers knew people had been diving from a former lifeguard's platform into an area outside the cork line, where the water was not deep enough for safe diving. The trial judge did not overlook the evidence, reviewing it carefully when considering liability.

The balance to be struck in this case was between the negligence of the park management in failing to warn users of the danger of diving into the waters inside the cork line, and the negligence of the respondent in diving into waters of unknown depth. The immediate and major cause of the respondent's injuries was his failure to take reasonable care for his own safety. He stated in his evidence that he noticed the cork line from the shore; he did not notice the buoys; he did not notice the float at the end of the pier or people standing on the float and diving from the float; he did not notice the sign to the right of the pier; he did not notice the "No Running" sign on the pier itself; he did not notice swimmers outside of the corked-in area and he did not see a footrail along the edge of the pier for the full length of the pier. By comparison, his friend Pallos had intended to dive from the same place, but was observant enough to see people standing in the water, and to know that he should not dive. Had the respondent taken time to make the same observation his injury might have been avoided.

The breach of duty by the park management was much less serious. There was a hazard, and at minimal expense warning signs could have been painted on the wharf. The park managers ought to have recognized that in crowded conditions, in a holiday atmosphere, people like Gerak, unless warned, might misinterpret the situation and

dive from the wharf. Their failure to recognize the hazard was not gross. But nevertheless there was a hazard capable of being recognized, as Ms. MacDonald and Miss Engemoen testified, and there were safety precautions which could have been taken. Comparatively, however, the carelessness of Gerak was great, and the carelessness of the park managers was less serious.

We have been referred to many cases involving diving accidents at public wharves. The facts situations differ greatly, and it is not useful to review them here. But what can be said is that the responsibility of a diver who enters waters of unknown depth has often been held to be the major cause of the injuries suffered when compared with the failure to post warning signs.

Apportioning fault in cases of this kind is very difficult, and individual judges will differ in their assessments. An appellate judge ought not to substitute his own opinion for that of a trial judge just because he might have made a different assessment of fault. This Court is only justified in varying the apportionment in very strong and exceptional circumstances. (See Sparks et al v. Thompson [1975] 1 S.C.R. 618, 46 D.L.R. (3d) 225).

In this case I am unable to say that there was any reversible error in the apportionment of fault, and I would dismiss the cross-appeal.

Since writing these reasons I have had the advantage of reading the reasons of the Chief Justice, with which, with respect, I agree entirely.

Alan B. Macfarlane JA