

# Swain v Waverley Municipal Council

## Case Notes: Swain v Waverley Municipal Council 2005 HCA 4

S619/2003

**This case may be viewed at:**

[http://www.austlii.edu.au/au/cases/cth/high\\_ct/2005/4.html](http://www.austlii.edu.au/au/cases/cth/high_ct/2005/4.html)

On the 7th November, 1997, Guy Swain became a quadriplegic after diving into a sandbank whilst swimming between the flags in calm conditions at Sydney's renowned Bondi Beach. Responsibility for care and management of the beach rested with the Waverley Municipal Council. Mr. Swain contended that the Waverley Municipal Council had been negligent in that it failed both to position the flags with reasonable care and to warn of the sandbar.

In the initial trial before a judge and jury of four, the Council was found to owe a duty of care to beachgoers because of its responsibility for the beach. Although the jury found negligence on the part of the Council, it also decided that Mr. Swain was partially to blame for the unfortunate accident, reducing the damages awarded to him to \$3.75 million.

The Waverley Municipal Council then took the matter to the New South Wales Court of Appeal. Here, the original findings were queried on the grounds of a lack of reasonable evidence on which a jury could determine the Council liable in negligence. A majority decision in the Court of Appeal upheld the Council's challenge and overturned the earlier decision.

Finally, Mr. Swain successfully appealed to the High Court. At issue was whether the majority in the New South Wales Court of Appeal had been mistaken when they decided that there was no evidence that a reasonable jury could have considered to find the Council in breach of its duty concerning the placement of flags to demarcate a safe swimming area. The twin concern, that of the absence of warning of the sandbar, was not raised.

Chief Justice Gleeson along with Justices Gummow and Kirby found that the Court of Appeal had erred. Justices McHugh and Heydon dismissed the appeal. For Chief Justice Gleeson, the original jury verdict would stand as it was the jury's role to determine questions of fact, including the reasonableness of the Council's behaviour. At Paragraph 19 of the judgment, he states that the question for the Court of Appeal was, "Whether it was reasonably open to the jury to make an assessment unfavourable to the Council, not whether the Appeal Court agrees with it." In his opinion, the jury's verdict was tenable. Justice Gummow re-inforced this interpretation by suggesting that beach flags connote ocean swimming with wave interaction such as "flat" diving. He concluded that, "It was open to an Australian jury, familiar with the popular recreation of ocean swimming and surfing, to interpret the message that the flags in position on the day of Mr. Swain's injuries communicated in this way." Since the majority upheld Mr. Swain's position, the Court of Appeal judgment was set aside.