

## ELECTRONIC MAIL

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Date: 8 September 2009

Your ref: Our ref: 1WDN:8KMT 9804322

Subject: Tree liability

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Dear Lenny,

You seek our advice as to the liability of the Borough in respect of injury or damage caused by trees or branches of trees falling within areas of Crown land in respect of which the Borough is a Committee of Management under the *Crown Land (Reserves) Act 1978*.

You have instructed us that a risk management assessment report in respect of trees in these reserves was prepared in 1985 but little or no action was taken in response to that report. A current strategy is nearing completion, looking at the Borough's potential obligations across three coastal parks in respect of which it is a Committee of Management.

The relevant legal principles can be stated as follows.

The Borough, as the occupier of the land by virtue of its role as Committee of Management, owes a duty to persons on the land pursuant to section 14B(3) of the *Wrongs Act 1958* (**the Wrongs Act**) and also under the provisions of the common law. The common law is a series of case based legal principles which, in this case, sit side by side with the statutory obligations contained in section 14B(3) of the *Wrongs Act*.

Section 14B(3) provides:

*"An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that any person on the premises will not be injured or damaged by reason of the state of the premises or of things done or omitted to be done in relation to the state of the premises."*

Subsection (4) of section 14B of the *Wrongs Act* provides:

*"Without restricting the generality of subsection (3), in determining whether the duty of care under subsection (3) has been discharged consideration shall be given to-*

- (a) *the gravity and likelihood of the probable injury;*
- (b) *the circumstances of the entry onto the premises;*
- (c) *the nature of the premises;*
- (d) *the knowledge which the occupier has or ought to have of the likelihood of persons or property being on the premises;*
- (e) *the age of the person entering the premises;*
- (f) *the ability of the person entering the premises to appreciate the danger;*

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- (fa) *whether the person entering the premises is intoxicated by alcohol or drugs voluntarily consumed and the level of intoxication;*
- (fb) *whether the person entering the premises is engaged in an illegal activity;*
- (g) *the burden on the occupier of eliminating the danger or protecting the person entering the premises from the danger as compared to the risk of the danger to the person."*

The legal principles arising in relation to a claim based on common law negligence provisions can be detailed as a requirement "to conform to the legal standard of reasonable conduct in the light of the apparent risk." see McHugh J in *Vairy v Wyong Shire Council* (2005) 223 CLR 442 (**Vairy**) at p432 and Hayne J also in *Vairy* at p459 where he said:

*"...it is necessary to recognise that the duty of care, owed by a statutory authority to those who enter land of which the authority has the care, control and management, is not a duty to ensure that no harm befalls the entrant. It is a duty to take reasonable care. Beyond that, however, it is not possible to amplify the content of the duty without reference to particular facts and circumstances. In each case, the content of the duty will turn critically upon the particular facts and circumstances."*

In determining what constitutes taking reasonable care it is useful to consider the judgment of Mason J in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 (**Shirt**) at p47-48 where His Honour said:

*"In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. 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 the 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."*

The task of the Court described in the above extract from the judgment of Mason J sits consistently beside the task posed for the Court by Section 14B(3) and (4) of the *Wrongs Act*.

In a well published decision of the County Court of Victoria handed down in July 2008, *Parks Victoria* was found to have breached its obligations in relation to a camper, Stuart Russell Larner, who suffered catastrophic injuries when a branch from a dead Red Gum tree fell onto Larner's campsite. *Larner v Parks Victoria* (**Larner**) case number CI-03-07820.

Evidence before the Court in the *Larner* case was that Parks Victoria had held a risk assessment and risk evaluation report for some time prior to the injury which report had made a number of recommendations in relation to establishing a tree management program for popular camping and picnic areas and included a recommendation for the removal of trees and limbs that are identified as dangerous, or, where a tree had characteristics which warrant it be retained, it was recommended that access to the immediate area should be barricaded off and warning signs provided. The report also recommended that more general warnings should be displayed of the risks of camping and parking near trees, giving appropriate distances for the setback of campsites.

The Court, in *Larner*, after having considered the knowledge which the plaintiff as a category of persons being campers in the reserve, went on to determine what Parks Victoria, acting as a reasonable person, should have done by way of response to the identified risks. In undertaking this task the Court acknowledged the large geographical area of responsibility of Parks Victoria and the resources it has to carry out its tasks. The Court noted that Parks Victoria had taken no action in response to the risk assessment report which it had held for about two and a half years. The Court ultimately held that the recommendations of the risk assessment report of an annual inspection of

trees and response by way of removal or particular warnings would have been over and above the requirements of a reasonable occupier of the land.

The Court in *Larner* found that there were steps which would have met the requirement of taking reasonable care without involving excessive burden. The steps were:

- (i) to increase staff over the camping period to give an increased capacity to advise campers;
- (ii) to educate its rangers of the risks of camping proximate to trees and for them to make such risks known to campers;
- (iii) to have educated its rangers about the risks raised in its risk assessment report or to have devised recommended safe distances for camps from trees and advised entrants to the camping areas of those dimensions; and
- (iv) to have required its rangers to have undergone an available 120 hour TAFE course to give rangers a capacity to assess trees for structural hazards.

The Court in *Larner* went on to find that as a consequence of the breaches of duty found by the Court namely, in that case to:

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- (a) *appropriately train or educate its staff;*
- (b) *appropriately advise entrants to the Reserve by way of:*
  - (i) *signage*
  - (ii) *notice*
  - (iii) *newspaper articles; or*
  - (iv) *by the use of existing rangers, or the employment of additional rangers, to provide oral advice when visiting campsites*

*of the unusual danger and risk that falling limbs from Red Gums as provenanced at the Murray River Reserve presented to entrants to the reserve.”*

The Court found that had the expanded warnings been given the plaintiff, Mr Larner, would have avoided the injury. The Court found a breach of duty under the *Wrongs Act* and under common law negligence principles and ruled that there was no contributory negligence warranting a reduction in damages and that there had been no voluntary assumption of the risk which would have disqualified the plaintiff from an entitlement to damages. The parties had agreed as to the quantum of damages in the event that the Court found Parks Victoria liable. My recollection is that that damages sum had been agreed at a multi-million dollar sum.

To determine what the Borough should do in the present instance, it is necessary to look at the particular facts and circumstances arising. I have not seen the 1985 risk assessment report or of any subsequent work updating that assessment. It can clearly be stated that the Borough cannot “*do nothing*” if there is a potentially dangerous situation posed by the condition of trees in the three Crown land reserves. The adequate response to a risk needs to be determined in the light of the range of matters set out in section 14B(4) of the *Wrongs Act*. In some instances different responses may be called for or adopted where, for example, a tree has particular heritage value and sufficient protection can be given to invitees to the land other than by removing the tree.

In determining what is an adequate response, considerable regard must be placed on the reality that the three coastal parks will attract a significant number of visitors, including children, who have

exploring natures and who may not understand or are more likely to have no regard to warning notices. Language barriers are also likely to arise where the numbers of visitors are significant.

If you require more specific advice in relation to a particular proposed response I would be happy to provide that further assistance.

The Borough will be insured for the type of claim that would arise in the case of an injury to a reserve invitee. However, the terms of any policy would require that the Borough take appropriate steps to avoid the risk of claims being made and it is therefore not an option simply to say that the Borough is insured and therefore no action need to be taken to respond to a risk.

Without wishing to overstate the risk of personal liability to councillors in the event that a view prevails that is clearly an inadequate response to the Borough's obligations as occupier and manager of coastal reserves, it is appropriate to make reference to the *Local Government Act 1989 (LGA)*.

Section 76 of the LGA requires that a council must indemnify and keep indemnified each councillor and staff member in respect of any act or thing done or omitted to be done in good faith in the exercise or purported exercise of a function or power. This good faith requirement in order to be entitled to the indemnity provision demands proper consideration to be given to the response to an identified risk. I should add it would be a rare and blatant occurrence for there to be any personal liability on a councillor who participates in the decision making process of a council on this issue.

Please contact me if you require anything further at this stage.

Yours faithfully,

**Warrick Nelson**  
**HARWOOD ANDREWS LAWYERS**

Attachments: NIL