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Public Liability Case Review

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PREFACE

Since the so-called “public liability insurance crisis” of 2002, there has been a common misconception that when it comes to public liability claims, “every player wins a prize”. The rhetoric from insurance companies in their submissions to government consistently asserts that plaintiffs are “over compensated” and that it is too easy for plaintiffs to succeed in common law jurisdictions. But this submission defies the reality of the situation.

Having presented a paper every year for more than two decades dealing with public liability claims across Australia, it is quite clear that even before the “tort reform” which saw civil liability legislation introduced to most Australian states in 2003, plaintiffs in public liability claims had a high hurdle to clear if they wished to prove negligence on the part of an occupier. The High Court has made it clear that the world is not a level playing surface and that footpaths and public places cannot be judged by the standards of a bowling green.

Whilst the statistics vary from year to year a consistent theme in the judgments is that claims will be dismissed where there is not clear evidence both of a breach of duty and that that breach of duty caused (in a legal sense) the plaintiff’s injuries.

In the 2021 calendar year it was actually the defendants who were most successful before Australian Trial Judges, winning greater than 50% of the time. Historically, plaintiffs have perhaps been slightly more successful, winning somewhere between 50-60% of the time, the statistics beg the question – was the 2021 success of defendants merely an aberration or the start of a new normal?

INTRODUCTION

The public liability case summaries for the 2020 calendar year once again involve all cases that I have been able to find in Australian Courts where the decision rests on principles of occupier’s liability. I have tried to exclude cases involving planes, trains and automobiles (and even the Manly Ferry!) as liability doesn’t really rest on the type of principles that this paper focuses on each year. Cases which could have been included but, which didn’t neatly fit my definition of a “public liability” claim include the following:

- *Tanesha Simone Anne Winmar by her Next Friend Claudia Jade Winmar v Ng* [2020] WADC 17 (14 February 2020)
- *Towers v Hevilift Ltd (No 2)* [2020] QSC 77 (15 April 2020)
- *Fung v Bossie Chau Pty Ltd t/a 278 Club, Chang & Hu* [2020] NSWDC 118 (21 April 2020)
- *Jeleskovic v Wagner (No 2)* [2020] NSWDC 126 (22 April 2020)
- *Moore v Scenic Tours Pty Ltd* [2020] HCA 17 (24 April 2020)
- *Wehbe v Manly Fast Ferry Pty Ltd* [2020] NSWDC 155 (30 April 2020)
- *Lawson v Hubbard* [2020] NSWDC 605 (13 October 2020)
- *Stevens v Professional Helicopter Services Pty Ltd; Stryker Australia Pty Ltd v Professional Helicopter Services Pty Ltd* [2020] NSWSC 1443 (20 October 2020)

THE CASES

1. *Yeung v Santosa Realty Co Pty Ltd* [2020] VSCA 7 (6 February 2020) Tate, Kaye & Niall JJA

Facts

Ms Potter was a tenant of a residential property owned by Mr Yeung. The real estate that managed the premises was Santosa Realty Co Pty Ltd. On the night of 19 May 2014, Ms Potter slipped on the back stairs of the property, which were worn, slippery, unlit and had no handrail. As a result, she fractured her right ankle. Ms Potter brought proceedings for negligence against the owner and the real estate in the County Court. At first instance, the trial judge found that both Yeung and Santosa had breached their duty of care to the tenant. The trial judge held it was reasonably foreseeable that a tenant using those stairs at night would fall due to their defective state. The trial judge held Yeung had breached his duty to Ms Potter by failing to ensure the property was maintained and in good repair. The trial judge held Santosa was liable for failing to carry out any proper inspection of the back stairs, failing to identify visible risks, and failing to report the risks to Yeung. The trial judge held that it was reasonable to assume a managing agent would detect those obvious defects. The trial judge ordered that both Yeung and Santosa pay damages to Ms Potter in the sum of $433,899.80 plus indemnity costs. The trial judge apportioned two-thirds of the liability to Yeung and one-third to Santosa. Yeung appealed that decision. The issue of whether Yeung should be indemnified by Santosa in respect of all his liability to Ms Potter was to be determined by the court.

Decision

Leave to appeal granted and appeal allowed. Orders of the trial judge set aside and replaced with orders that Santosa indemnify Yeung with respect to all liability and pay the full judgment sum to the plaintiff.

Ratio

Yeung's appeal was brought on the grounds that the trial judge had erred in finding that he had not delegated to Santosa his duty of care that he owed to Ms Potter to take reasonable care to avoid foreseeable risk of injury. Yeung also argued that the trial judge had erred in finding that he had failed to take any steps to ensure the property was in good repair and that he was in the best position to know what needed to be done to the premises. Yeung argued, on those grounds, the apportionment of two-thirds liability to him was made in error. Santosa argued that the property was old and in a state of disrepair. Santosa argued that the management agreement between itself and Yeung did not extend to carrying out risk assessments for hazards. Yeung argued that the management agreement imposed a duty on Santosa to carry out inspections and identify repairs that were required. Yeung put forward evidence that he received and reviewed inspection records from Santosa and that no defects were identified in relation to the stairs. Santosa was not able to put forward any evidence of having carried out inspections on the stairs. Yeung argued that, under the management agreement, it had fully delegated his duty as an owner with respect to inspections and management of the property to Santosa and that he should be indemnified by the agreement. The court agreed with Yeung's argument and found that Yeung had completely delegated his duty to inspect and identify obvious defects under the management agreement. The court found that, had Santosa done what was required of it under the management agreement, Ms Potter would not have suffered her injuries. The court held that Santosa had breached its duties to Yeung under the management agreement by failing to inspect the premises and identify obvious risks. The court held that Yeung was entitled to a complete indemnity from Santosa in respect of all of his liability to Ms Potter. The court ordered that Santosa pay the full judgment sum with no apportionment to Yeung, plus costs on an indemnity basis.

2. *Cornwall v Jenkins as Trustee for the iSpin Family Trust* [2020] ACTCA 2 (19 February 2020) Burns J, Loukas-Karlsson J and Crowe AJ

Facts

The appellant was injured while participating in an aerial sling exercise class (to which she was somewhat experienced in) while attempting a level III hip lock manoeuvre at the respondent's premises. The appellant had been directed to use a spotter and had been shown the manoeuvre with respect to not letting go of the sling. While attempting this manoeuvre, the appellant fell from the sling, breaking both wrists. At such time, the appellant was using a thin yoga mat as fall protection rather than a crash mat as supplied by the studio (though they were not required to use them). The appellant brought a proceeding of negligence against the respondent, who ran the fitness class. The respondent denied negligence and asserted that, if negligence was proven, the appellant was contributorily negligent. The primary judge found that the respondent had not breached her duty of care to the appellant by failing to require that the plaintiff use a crash mat. His Honour deemed that there was a foreseeable risk of harm arising out of the class, but that the likelihood of the accident occurring was low given that no one had fallen from the sling in the time they were involved with the business. The instructions given were said to have been in light of the move to be performed and the fact that the plaintiff had experience performing sling moves. Thus, the trial judge found that insistence of using a crash mat was not a measure that a reasonable person in the position of the defendant would have taken. The hearing concluded in favour of the respondent. The appellant appealed this finding in the current appeal.

Decision

Appeal allowed. The judgment for the respondent entered by the primary judge is set aside, and in substitution there will be judgment for the appellant in the sum of $372,297.34.

Ratio

At first instance the primary judge found that causation had not been established as the evidence was not sufficient to determine that the use of a single layer of yoga mat would have avoided the injuries the plaintiff suffered. There was no expert medical evidence to suggest that the wrist injuries would, on the balance of probabilities, have been avoided. On appeal, expert evidence provided by both the appellant and the respondent, expanded on the notion that the crash mats available in the studio were appropriate to minimise the risk of injury to the appellant. While it was not possible to entirely remove the risk of injury by use of a crash mat, the respondent's duty to the appellant did not extend to a duty to eliminate all risk of injury. The appellant's injuries were entirely consistent with the description of the fall. In these circumstances, a crash mat would have offered considerable protection. The respondent's expert went on to further state that the respondent had discharged its obligations to the appellant, particularly with respect to having appropriate harm minimisation mechanisms in place. Though, this contradicted his prior statement that the mats would have offered protection.

The primary judge was found to have erred in determining that the evidence did not establish a breach of the respondent's duty, by failing to insist upon the use of crash mats while attempting the level III hip lock manoeuvre. The risk of a fall from the sling was plainly foreseeable. The lack of prior accident history, although relevant, did not conclusively establish a low risk of injury if crash mats, rather than the yoga mat, were not used. A reasonable person in the position of the respondent would have provided adequate fall protection by way of crash matting to protect against injury occasioned by a fall from the top of the sling. The risk of injury by not using the crash mats may not have been high, but it was of the court's opinion, not low. The risk of significant injury if a person fell from the top of the sling was substantial. This was not a case where there was, or could be, any suggestion that there was no reasonably practicable method of reducing the foreseeable risk of injury to the appellant in undertaking the level III hip lock manoeuvre.

Another issue raised by the respondent was the area to be covered by the crash mats. Though, in the absence of any suggestion that the appellant was swinging on the sling or in some other way misusing it, the only reasonable inference was that she fell within the anticipated fall zone. Whilst the failure to use the crash mat was not considered to have been something for which the appellant was held to have contributed to her injury, the failure to use a spotter and to not perform the manoeuvre correctly (by

letting go of the sling) amounted to some contribution towards her injuries – contributory negligence was assessed at one-third.

3. *Shaw v Oakdale Junior Motorcycle Club Inc* [2020] NSWSC 180 (6 March 2020)
Cavanagh J

Facts

The plaintiff suffered a severe head injury, which left him with significant permanent brain injuries while participating in a motocross event in 2004. As the plaintiff proceeded around the first corner of the track, his bike was clipped by another rider which forced him to hit the first jump on the track on an angle and come off his bike as a result. He was then further hit by another rider once he had fallen. He sued the State of NSW. The plaintiff's claim rested on an allegation that the State had improperly issued a licence to a motocross track which was non-compliant with relevant standards and by-laws, and that it was the track itself that caused his accident, and therefore his injuries. The State denied this and pleaded that the risk of harm was an obvious one.

Decision

Judgment for the fourth defendant (State of New South Wales) against the plaintiff. The crossclaims were dismissed.

Ratio

The plaintiff claimed that the defendant owed a duty of care – such allegations were made in terms of vicarious liability. The plaintiff claimed that as a delegate relied on the opinion of the representative of Motorcycling NSW for inspecting and reporting on the facility, that the State was vicariously liable as a result of the deficiencies in reporting and ultimately granting the license. Seeking advice from a representative of the sport's governing body that the facility was suitable for licensing did not create a relationship which imposed on it a vicarious liability for the conduct of the representative of Motorcycling NSW. In regard to causation, the plaintiff essentially asserted that had the track been identified as unsafe in July of 2004, when the license was granted, that the event in August when the plaintiff was injured would not have gone ahead. Thus, the plaintiff's injury would not have occurred. This argument did not succeed as the court was not satisfied that if the State had properly identified the alleged non-compliance in the track at the time of the application for licence and refused to issue a licence, the operator of the track would have simply abandoned its application for a licence rather than fixing up the track to make it compliant.

His Honour found that motocross was objectively a dangerous recreational activity. Motocross involved a significant risk of physical harm. The risk was an obvious one in that in the circumstances, the risk of being clipped by another bike and falling off would have been obvious to a reasonable person in the plaintiff's position. His Honour did not accept the plaintiff's submission that the risk in question was riding on a non-compliant track which would not be obvious, as he did not accept that the harm arose by reason of any non-compliance. The true source of injury was falling off the bike as a result of coming into contact with another bike. That was the risk of harm. The fact that the plaintiff was then hit by another bike whilst on the ground was a consequence of being clipped by the first bike and falling off. The defence afforded by section 5L was established and the State was not liable in negligence for harm suffered by the plaintiff as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff. In considering negligence in the context of the s5B of the *Civil Liability Act 2002* (NSW), the plaintiff identified the risk of harm as the risk of being clipped by another rider as a result of the presence of an incorrect placement of a jump after the first corner. As discussed, the risk was rather falling off the bike as a result of coming into contact with another bike. Nonetheless, the plaintiff failed to identify what reasonable precautions the defendant could have taken. This was particularly difficult given the State did not know the track was non-compliant and the plaintiff did not identify what steps the State should have taken to ascertain that the track was non-compliant in mid-2004.

4. *Mohammed Abed v Canterbury-Bankstown Council* [2020] NSWDC 55 (19 March 2020) Abadee DCJ

Facts

The plaintiff was a disability pensioner who had attended the celebration of Ramadan at a mosque in Punchbowl on 13 June 2018. After the ceremony he was returning to a council occupied carpark with his nine-year-old son. He took a shortcut through a garden bed where there were no barriers in order to get to where he thought his car was parked. He had to step down a very small step from the garden bed of some centimetres onto the surface of the carpark. As he did so his foot went into a pothole and he fell and suffered injuries.

The plaintiff gave evidence that he had not taken that path before although he conceded he had used the carpark on previous occasions. The carpark was only about 100m or so from the mosque.

The Council denied that it owed a duty of care, denied any breach of duty and alleged contributory negligence.

Decision

Judgment for the plaintiff in a sum of $76,746.50.

Ratio

Although the trial judge thought that some recollections of the plaintiff were poor and that his evidence should be approached with caution, he was thought to be an honest witness. It was found that the fall had occurred at night, after 7pm in circumstances in which there was no real lighting in the area. The trial judge granted leave for an amendment to be made to the pleadings to allege that the fall had occurred in the actual carpark occupied by the defendant rather than on the garden footpath. The trial judge found that a duty of care was owed and that the duty was one to exercise reasonable care so that the premises were safe for pedestrians in the position of the plaintiff. It was found that the obligation is to exercise reasonable care to prevent injury to entrants to the premises who are using reasonable care for their own safety [at 35]. It was found that for the purposes of section 5B of the *Civil Liability Act* (NSW), the relevant risk was the risk that a pedestrian walking in the direction of the car park might suffer personal injury by tripping in the pothole (rather than the risk of personal injury from stepping off the garden pathway, as the defendant contended).

The trial judge rejected the defendant's argument under section 5H of the *Civil Liability Act* (NSW) that the risk of harm was "obvious risk". The trial judge said at paragraph 56:
I reject the Council's defence under Part 1A, Div 4. Even if it had applied, the defence would not afford a complete answer to the plaintiff's claim. In *C G Maloney Pty Ltd v Hutton-Potts* [2006] NSWCA 136, Santow JA said (at [102]) that liability in negligence is not conterminous with situations calling for warnings: a warning may be insufficient to discharge the duty of care or even irrelevant to its discharge, depending upon the circumstances. The effect of the provisions in subsection 5F and 5G is that they may obviate a common law duty to warn, but they do not otherwise affect the question of whether there has been a breach of duty.

Breach

Photographic evidence from June 2016 showed that at one point in time the access to the carpark through the garden bed which had been used by the plaintiff was, in fact, blocked off by a railing but that by 2017 it had been removed.

Because of the proximity of the garden pathway to a toilet block and shops, the trial judge believed that there was a high probability that the garden pathway would be utilised by pedestrians seeking access to the carpark. The trial judge found:

> In my opinion, in the absence of any lighting, the probability that a pedestrian in the plaintiff's position, walking along the garden path and stepping off it on to the car park at night time in mid-June, might not see the potholes is very high. Perhaps the degree of probability might be

> affected by a pedestrian consciously looking down off the step, but even in that event, in my opinion, there was a very strong possibility that even the most attentive pedestrian might not see them. In other words, on the basis of the evidence before the court, the probability of harm occurring if the Council did not take care appeared to be high [at 69].

Causation

The Council submitted that even if there was negligence, the true cause of the injury was the plaintiff's failure to look where he was going. The trial judge rejected this:

> 'Factual causation' connotes that the defendant's negligence was a necessary condition of the occurrence of the harm. It does not, by its terms, speak of other conditions which may have, independently or jointly with the defendant's negligence, contributed to the occurrence of harm. It is, as the High Court said in *Wallace v Kam* (2013) 250 CLR 375, simply the application of the 'but for' test. In my view, but for the negligent failure of the Council to take reasonable precautions to prevent the risk of harm, Mr Abed would not have fallen after stepping into the pothole(s) on the carpark [at 80].

Had the Council either impeded access to the pothole or filled in the pothole, then the accident would not have occurred, and a causal connection is established.

Contributory Negligence

The Council contended that the plaintiff was contributorily negligent to the extent of 100%. The plaintiff contended that there was no contributory negligence. The trial judge found that causation could not be established by the defendant because even if the plaintiff had been looking down rather than looking ahead (as it was found that he was at the time of the accident), he would not have seen the hole because of darkness.

The trial judge thought that in case he was wrong about that, he would have assessed the plaintiff's contributory negligence at only 10% because it was the Council who had the duty and capacity to prevent the harm from occurring – a risk which could present serious risk even to the most reasonable of reasonable persons walking along the garden path at night.

5. *Massouras v Kone Elevators* [2020] ACTSC 66 (3 April 2020) Burns J

Facts

In 2013, four individuals, one of them the plaintiff, entered into a lift. The lift malfunctioned when it suddenly stopped, causing injury to the individuals. The applicable legislation in this case was section 42 of Chapter 4 of the *Civil Law (Wrongs) Act 2002* (ACT) (CLWA) surrounding duty and standard of care. It was identified that the cause of the stopping nature of the lift, as experienced by the plaintiff, was due to a defect in the control unit of the lift. The lift malfunction was specifically caused by to a poorly terminated wire causing in turn an open circuit to the lift drive which caused the lift to intermittently lose power and come to two abrupt and unexpected stops and restarts in quick succession.

Decision

Judgment for the plaintiff against the first defendant in the sum of $98,232.95; and
Judgment for the second to eleventh defendants against the plaintiff.

Ratio

Section 42 of the CLWA deals with the particulars of negligence. In deciding whether a person (the defendant) was negligent, the standard of care required of the defendant is that of a reasonable person in the defendant's position who was in possession of all the information that the defendant either had, or ought reasonably to have had, at the time of the incident out of which the harm arose. The relevant was that passengers in the lift may be injured if the lift malfunctioned due to intermittent loss of power. The defendants could only be liable in negligence if the risk was foreseeable. It was evidently found

that in the lift industry, sudden stops for lifts travelling at the speeds of the lifts in the premises can easily cause damage to any passengers experiencing that sudden stop. The risk of injury to a passenger in a lift by reason of the lift suddenly stopping in the course of a descent by reason of a loss of power caused by inadequate maintenance was clearly a foreseeable risk. If the power supply had failed through no fault of the defendants, then any injuries sustained by the plaintiffs would not find an action in negligence against the defendants.

But, the power supply failure to the lift was found to be due to a lack of reasonable care by the defendants in maintaining the lift. The fact that the defendants had not maintained the lift made the risk a foreseeable one. Ultimately, all that was required to avoid this risk was appropriate care in the maintenance of the component of the lift. If the loss of power to the drive unit was, as it was satisfied, caused by damage to the wire by the defendant's staff in the course of routine maintenance, this was something which could easily have been avoided by the application of proper care and attention. Given the risk of harm was notably evident, the burden of avoiding the risk was not onerous. A reasonable person in the position of the defendant would have taken the appropriate actions to avoid the risk. The defendant breached its duty of care to the plaintiffs by performing maintenance on the connection to the drive transformer without due care and attention, resulting in the wire breaking, which in turn resulted in intermittent power loss to the lift.

6. *Carnemolla by her tutor Carnemolla v Arcadia Funds Management Limited* [2020] NSWDC 108 (9 April 2020) Gibson DCJ

Facts

The plaintiff, a 40-year-old woman whose disabilities required her to be represented by a tutor (her mother), bought proceedings for damages for personal injury. The plaintiff's injury occurred on 29 September 2016, when while visiting Neeta City Shopping Centre (premises which are occupied and managed by the defendant) with her mother, she slipped and fell while she was walking along the corridor leading away from the female toilets. Though, at the time of the incident, she was not in the presence of her mother. The plaintiff's fall occurred at 12:22pm, which was acknowledged to be the lunch period and the busiest period of day for the shopping centre. The plaintiff told the cleaning staff who were called to assist her that she had slipped on water on the floor in the area immediately in front of the female toilets. Though, on the arrival of cleaning staff, they could not find or establish any water was in existence at the slip site. The cleaning rotation of this area occurred at intervals of not more than 15 minutes, and in bathroom areas 20 minutes. There was also no prior history of any slips or falls in the corridor in question.

Decision

Judgment for the defendant.

Ratio

The defendant's duty of care was not in dispute in this matter. Though, there were some deficiencies in establishing that there was in fact water on the floor, and that the defendants had breached their duty of care to the plaintiff. An expert was engaged by the plaintiff; however, his report was defective on the basis that it was centred on the assumption that water was in existence and the cause of the fall in the circumstances. Again, this was on the basis where neither the plaintiff nor her mother were able to give direct evidence or gave direct evidence of that to be the case. The experts report was additionally defective in providing formal recommendations in which three did not proceed, leaving one recommendation with respect to replacing the flooring tiles. Yet, there were no providing of costings for such flooring or any other recommendations (relevant to the burden of taking precautions to avoid risk of harm). There was no doubt that the plaintiff fell, however the plaintiff's evidence was insufficient to establish that she fell on water. Without any evidence to the presence of water on the floor, it could not be established that the defendants had breached any duty they owed to the plaintiff with respect to their cleaning duties of the premises. Section 5B of the *Civil Liability Act 2002* (NSW) essentially states that a person is not negligent in failing to take precautions against a risk of harm unless: (a) the risk was foreseeable, (b) the risk was not insignificant, and (c) in the circumstances, a reasonable person in the person's position would have taken those precautions. In determining whether a reasonable person would have taken precautions against a risk of harm, the court will consider (a) the probability that the

harm would occur if care were not taken, (b) the likely seriousness of the harm, (c) the burden of taking precautions to avoid the risk of harm and (d) the social utility of the activity that creates the risk of harm. In the absence of any prior spillages, slipping dangers or incidents relevant to these factors, foreseeability could not be made out. The defendant had discharged its obligation by a system of cleaning. Given the lack of reliable expert evidence, the burden of taking precautions (being replacement of flooring) was not satisfactory to meet the elements of section 5C.

7. *Menz v Wagga Wagga Show Society Inc* [2020] NSWCA 65 (21 April 2020) Leeming JA, Payne JA and White JA

Facts

The appellant was seriously injured when her horse was spooked and fell on her while warming up before competition on the second day of the Wagga Wagga Show in 2012. Some children who were in close proximity to the area where the appellant was warming up, came into contact with a metal sign which made a significantly loud noise. The noise startled a horse being ridden in the appellant's vicinity, which in turn caused her horse to startle, therefore faltering and falling onto the plaintiff. The respondent accepted that it had the care, control and management of the show held at the Wagga Wagga showground. The appellant sued in negligence and pursuant to a statutory guarantee imposed by the Australian Consumer Law. She appealed as of right from the judgment entered against her following a four-day trial in the Common Law Division. The primary judge based his decision on a number of specific defences, principally that based on "obvious risk" of "dangerous recreational activity" in section 5L of the *Civil Liability Act 2002* (NSW) ('CLA'). Section 5L awards that there is no liability suffered from obvious risks of dangerous recreational activities. It states that a defendant will not be held liable for negligence for harm suffered by a plaintiff as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff. His Honour also considered that if the specific defences were inapplicable, then the appellant had not established any breach of duty.

Decision

Appeal dismissed.

Ratio

The issue to be determined was as to the appropriate specificity or generality to describe both the appellant's conduct (competitive horse riding per se, or horse riding while warming up before competing) and the risk which materialised (personal injury from a horse falling, or personal injury from a horse being spooked by the unlikely event of a sharp noise made by children near the warm-up area and falling). The plaintiff contended for her risk and conduct to be considered narrowly, as the noise that was made by the children. The defendant contended for a more generalised characterisation, as the risk of riding the horse. The NSW CLA is to be read as a whole. Thus, in making a determination, section 5M (5) was referred to given its direct link with section 5L. This subsection states that:

> "A risk warning need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk)."

Section 5M(5) also explicitly avoids the specificity of a risk warning and instead endorses a warning of general nature. Thus, the court held that a general, broader characterisation was appropriate.

Section 5L required there to be a causal connection, being a link between the harm being suffered as a result of the materialisation of an obvious risk. The focus in determining causation was in the determination of the materialisation of an obvious risk. This was as opposed to the plaintiff's attempt to identify facts which were not "materialisation of an obvious risk" but which were causally connected with the plaintiff's harm. The focus was to be on whether the respondent's characterisation of what occurred was an appropriate one so as to engage section 5L.

To determine whether the respondent's characterisation of what occurred was an appropriate one so as to engage section 5L, the following considerations required had to be satisfied:

- "First, the obvious risk was in principle to be specified with a degree of generality;
- Secondly, the specification of the obvious risk was to be sufficiently precise as to capture the harm which resulted from its materialisation on the facts of the particular case;
- Thirdly, the obviousness of the risk was to be considered from the perspective of the plaintiff, prior to the incident occurring;
- Fourthly, a close causal connection was required between the harm and the risk which materialised; and
- Finally, the proper characterisation was fact-dependent, and would turn on the evidence in any particular case of what occurred, and why the risk was one that was obvious." [70]-[74]

It was ultimately found that the harm caused to the appellant was as a result of the fall. Despite the indirect cause being the noise made by the children, this did not deny the conclusion that the entirety of the personal injury could fairly be said to be "as a result of" the horse being spooked and the appellant losing control. While the precise mechanism of the appellant's horse being spooked may not have been obvious, the fact that her horse could be spooked by some stimulus at any time was obvious. The court made note of three inescapable facts on this point:

- There was no such thing as a bomb proof horse;
- Horses may at any time be spooked by a noise, a shadow or some other stimulus; and
- The rider runs a risk of serious injury in the event that a horse is spooked. [79]

Those facts made it appropriate to characterise the harm suffered by the appellant as the materialisation of the obvious risk of her horse being spooked by some stimulus.

The appellant sought to distinguish between a warm-up from participating in a competition, though the court did not accept this submission. It was not appropriate to separate the warm up from a 'recreational activity', but in any event, the warm up itself was in fact a dangerous recreational activity. Ultimately, riding a horse was found to be the relevant recreational activity, to which it was considered a dangerous one. Therefore, the challenge to the section 5L defence was not made out and the appeal was dismissed. On the basis of arguing negligence, the reasonable steps to be taken to avoid the risk were assessed. It was found that the proposal by the plaintiff that a steward be in the warm up area to stop children making noise, was not a reasonable step. It would not have prevented children from behaving identically somewhere else in the vicinity of the track. Nor would a reasonable person have taken such precautions. Of relevance is the issue of a risk warning. Under s 5M, there is no duty of care for a recreational activity where a risk warning is given. In this particular instance, the plaintiff had signed a waiver and it was argued that this was a risk warning given. It was determined that the waiver document outlining risks associated with the competition was not effectively a risk warning, as it was not directed to informing competitors of danger but rather extracting an acknowledgement of voluntariness and an indemnity. Lastly, in regard to the Australian Consumer Law ('ACL'), it was conceded that if section 5L applied, it would apply to defeat both the claim in negligence and any statutory guarantee under the ACL.

8. *Nihill v Vivien's Model and Theatrical Management; Lehanneur* [2020] NSWDC 131 (22 April 2020) Hatzistergos DCJ

Facts

The plaintiff was a model under the management of the first defendant, Vivien's Model and Theatrical Management. The plaintiff was attending a photo shoot with the second defendant, that was arranged by the first defendant, in Sydney Harbour National Park when the accident occurred. The job was unpaid and was undertaken in order to add to the plaintiff's portfolio. The first defendant had always told the plaintiff that she did not have to do anything she was not comfortable doing while engaging in a photo shoot. Before the shoot began, the second defendants told the plaintiff of the dangerous nature of the trail, describing it as treacherous. Nonetheless, the plaintiff agreed to taking the trail. While the plaintiff was walking around rocks on the way to the rock pools she was to be photographed at, she slipped off a rock cliff and consequently fell a distance over four metres onto another rock formation below. The plaintiff therefore brought proceedings in tort for personal injuries arising out of this accident. There

were some factual disputes surrounding the plaintiff's recollection of continuing on with the walk in unsafe circumstances compared to the other parties.

Decision

Verdict and judgment for the defendants on the plaintiff's claim. The cross-claim was dismissed.

Ratio

This judgment considered whether firstly, the plaintiff was involved in a recreational activity, and secondly, whether it was a dangerous one. It was found that the pursuit of going to the rock pool for a photo shoot was a recreational activity. On this point, the plaintiff contended that given the location was difficult to access, and there was no evidence to adduce its use for leisure purposes, that it was not a place under the Act. This argument ultimately failed given that the area travelled to was a public open space, being part of a national park. The fact that some parts were more difficult to access than others did not preclude it from falling within the legislative descriptor. The plaintiff accepted on a number of occasions that the pursuit to the rock pools was a dangerous one. She also accepted that when walking along the rocks on the seashore, they could be slippery, and there was a risk that she could injure herself. Despite the reassurances from the first and second defendant, their words would not have done anything to reduce the assessment of risk of physical harm in the eyes of a reasonable person in the plaintiff's position. Taking into account all of the circumstances, the recreational activity was held to have involved a likelihood of injury and seriousness of injury that was high, such that it amounted to a significant risk of physical harm. Thus, there was a dangerous recreational activity. In regard to the materialisation of obvious risk, the relevant risk of harm was of the plaintiff slipping and falling while walking on tidal rocks at Blue Fish Point. Given these findings, the defendants were found not to be liable in negligence for the harm suffered by the plaintiff.

The defendants further relied on section 5M(1) of the Act (no duty of care for recreational activity where risk warning). It was ultimately found on this ground that a sign warning of the risks of being injured either through the cliff edge giving way or use of climbing aids due to an unfenced 30 metre drop and rocks below, was not a risk warning of the recreational activity. It did not include the particular risk encountered by the plaintiff of slipping and falling while walking on tidal rocks. Advising the plaintiff that she did not need to continue if she was uncomfortable also did not constitute a warning of any risk. Further, the second defendant did not identify that warning given to the plaintiff at the car park (that the path is going to be treacherous and if she didn't want to do anything on the day she didn't have to) as constituting a warning of the general nature of the particular risk.

Liability of First Defendant

The first defendant had a duty to take reasonable care in its position as exclusive agent manager. They had a constructive knowledge of the risk of harm in that they were aware that there was intention of the plaintiff and second defendant to go down to the rock pools, and that this involved taking the track down. Simply telling the plaintiff that she should not be doing anything she wasn't comfortable with was not an adequate response to the risk of harm. The probability of harm, if care were not taken, was high, as was the seriousness of such harm. The burden of auditing every location and photo shoot to which the plaintiff may attend was unreasonable. Though, the burden of passing on information to the plaintiff was not. Even if His Honour was satisfied that a reasonable person in the first defendant's position would have taken the precautions identified, it could not be satisfied that the failure to take those precautions caused the particular harm. The court also failed to find any causative link in the argument that had the plaintiff been enabled to wear appropriate footwear, it would have prevented the risk of harm, or the harm from materialising. The plaintiff would have undertaken the journey, appropriate footwear or not.

Liability of Second Defendant

The relationship between the plaintiff and second defendant was not one which fell into a category in which the existence of a duty of care was established and well recognised. The parties attended as joint collaborators. The evidence established that the plaintiff was completely autonomous as to her decision to participate or cease to participate. No duty of care was owed

A separate argument was bought in that there was a failure on the part of the first defendant to ensure the plaintiff was appropriately insured. However, the evidence fell short of establishing any implied term that the first defendant would ensure that there would be appropriate insurance coverage for the plaintiff, or that the first defendant would ensure that second defendant had and maintained appropriate insurance to cover the plaintiff during the course of the job.

Even if it was found that duty of care was breached on part of the first defendant by not having insurance in place there was no evidence of the second defendant's capacity to satisfy any verdict the plaintiff may obtain.

9. *Kljusuric v Gajjh United Pty Ltd* [2020] ACTMC 14 (29 May 2020) Magistrate Morrison

Facts

The plaintiff was injured when she slipped and fell at a McDonalds Restaurant on 17 September 2015. The plaintiff had been standing in an area between the McCafe part of the restaurant and the general service counter. When the plaintiff moved towards the counter, she slipped and fell as a result of grease deposited on the floor from food produced at the premises. It was conceded by the defendant that it owed the plaintiff a duty of care pursuant to the *Civil Law (Wrongs) Act 2002* (Vic), but denied that it had breached its duty of care to the plaintiff, and if such a breach was established, the defendant's acts or omissions did not cause the plaintiff's injuries. The parties agreed that should the court find for the plaintiff, the quantum of damages be agreed at $120,000.00 inclusive of pre-judgment interest. The court heard evidence from lay witnesses and an expert engineer for each party.

Decision

Judgment for the plaintiff.

Ratio

The court heard evidence that approximately six months prior to the current incident, the plaintiff's knee had given way following a music lesson where she had been standing for one hour. Following that, the plaintiff wore a knee brace for about a week, but otherwise recovered. An issue in the proceeding, as agitated by the defendant, was whether or not the plaintiff's injury resulted from the slip, or if it was in fact her knee that had given way (subluxation) thereby causing her fall. The court was mindful of drawing inferences from apparent inconsistencies and accounts given by the various health professionals, and noted that it was not seriously contested that the plaintiff did not in fact suffer a subluxation of her knee at the time. In the circumstances, the judge was not persuaded that the evidence about how the plaintiff described the incident called into question the reliability of her evidence.

As to the state of the floor, the judge was satisfied that the floor, which was a dark coloured hard-tiled floor, reflected obvious shoe prints and marks and that those marks were the product of something on the floor and was not contamination brought in by pedestrians. The plaintiff described the floor as "greasy". A former employee of McDonalds gave evidence that there would from time to time be a build-up of grease between occasions when floor cleaning would take place. The court held that the photographs were consistent with the presence of grease on the floor, and as a matter of common experience, the presence of grease on such a floor is likely to lead to it being what may fairly be described as "slippery". It is necessary for the purposes of establishing causation that a plaintiff prove that it was more probable than not that the defendant's negligence was a necessary condition of the fall. As to the adequacy of cleaning procedures, the judge referred to the evidence of the former employee, which was that towards the end of the night the floor would be a bit slippery, and that if you had nothing to do and saw the floors needed cleaning you would ask permission to do so. The evidence impliedly indicated that it was not unusual for the floors to become a little bit slippery and suggested that there was an inadequacy in the cleaning routine that existed. With respect to causation, the judge observed that there was no direct evidence before the court as to the degree of slipperiness of the floor, however, some inferences might be drawn from other evidence, including the photographs and the evidence of the former McDonalds employee as to the surface becoming greasy and a bit slippery. As a matter of common sense, the extent of the deposit of grease on a hard-tiled surface affects the slipperiness of that surface. Accordingly, the court was satisfied that grease was present on the floor,

and that the presence of the grease caused slipperiness and a risk of injury which constituted a breach of the defendant's duty to take all care that was reasonable in the circumstances. The plaintiff's version of events was that she slipped and then suffered a subluxation of her knee, and the conclusion that spontaneous subluxation was unlikely is consistent with her version of events which the court accepted. The court held that the injury suffered by the plaintiff was caused by the defendant's breach of duty.

10. *Powell v JFIT Holdings Pty Ltd t/a New Dimensions Health and Fitness Centre* [2020] NSWDC 264 (4 June 2020) Judge Levy SC

Facts

On 14 February 2016 the plaintiff attended the defendant's gym. The gym floor was cluttered with various weights that had been left there by other gym members who had failed to put them away after their use. The plaintiff attempted to clear a floor space so that she could exercise. The plaintiff suffered an L4/5 disc prolapse in the course of relocating a 20 kg weight.

Decision

His Honour found in favour of the plaintiff and awarded damages of $551,097.62.

Ratio

His Honour found there was a reasonably foreseeable risk that a gym member might sustain injury while lifting equipment to clear away awkwardly strewn weights left in an untidy state on the floor. In response to this risk, a reasonable person would have taken the simple precaution of requiring its staff to inspect the weights area for tidiness and ensure the floor of the weights area was kept tidy. The defendant's failure to take this precaution amounted to a breach of the duty of care owed to the plaintiff. The defendant agitated for a finding of 50% contributory negligence on the basis the plaintiff ought to have asked for assistance to move the weights. This was rejected by His Honour because no staff were available to provide such assistance in any event. The defendant sought to rely on a waiver signed by the plaintiff as a defence to the claim. The waiver rested upon the definition of recreational activity. In this regard, the court found the clearing up activity undertaken by the plaintiff in the weights area was not a recreational activity, but merely a preliminary activity to recreational activity. Therefore, the defendant was unable to rely upon the waiver to exclude liability.

As to quantum, the plaintiff was 46 years old at the time of trial. She had undergone four surgeries to her spine as a result of her injuries. Despite having taken considerable sick leave, no claim was pursued for past economic loss. The plaintiff was employed in a senior administrative role earning over $200,000.00 per annum. She had persisted with full time work and had been promoted despite her injuries. Notwithstanding, the plaintiff was awarded $150,000.00 on a global basis for future economic loss.

11. *Goondiwindi Regional Council v Tait* [2020] QCA 119 (5 June 2020) Morrison and McMurdo JJA and Burns J

Facts

The respondent (plaintiff) Paula Tait was injured on Sunday, 25 September 2016 when she was riding her motorcycle with a group of other riders on the Leichhardt Highway through the Mittengang Creek floodway. This floodway was located at Billa Billa on the Leichhardt Highway about 47 kms north of Goondiwindi.

The plaintiff had succeeded at trial and been awarded damages by Jarro DCJ in the District Court in Brisbane.

The respondent (plaintiff) suffered injuries when she struck a large pothole in the floodway which was at the time about 20cm deep and about 30cm wide and 1m long.

Between 13 and 20 September 2016 there had been unseasonable and considerable rainfall in the region. On the morning of 22 September 2016, a representative of the Council inspected the floodway and saw that there was pavement damage and observed that the sealed surface of the roadway had begun to strip and that potholes were beginning to develop. The Council's patching crew attended the floodway that day and erected a temporary sign with the words "rough surface" and "reduce speed". That was erected on both approaches to the floodway. There were no sandbags available because they had been used up in the previous days due to flooding. No other attempts were made to secure the signs. By the time the respondent (plaintiff) and her group of riders happened upon the floodway, the signs had fallen over and could not be observed.

The Council was obliged under an agreement with the State Government (the "RMPC") to maintain that area of the highway. That included an obligation to maintain an install signage.

The Council appealed the trial judges' decision.

Decision

Appeal dismissed.

Ratio

The court (Morrison JA, McMurdo JA and Burns J) unanimously dismissed an appeal. The court rejected an argument by the Council that the "particular risk" for the purposes of Section 37(2) of the *Civil Liability Act* was the particular pothole which the plaintiff happened upon. Section 37 of the *Civil Liability Act* provides:

> "37 Restriction on liability of public or other authorities with functions of road authorities
>
> **(1)** A public or other authority is not liable in any legal proceeding for any failure by the authority in relation to any function it has as a road authority—
>
> (a) to repair a road or to keep a road in repair; or
>
> (b) to inspect a road for the purpose of deciding the need to repair the road or to keep the road in repair.
>
> **(2)** Subsection (1) does not apply if at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm."

Section 37(2) does not apply in the circumstance of the respondent's (plaintiff's) case because the risk here was that it had been identified by Council workers that potholes could develop or worsen and if that happened, a road user could be harmed. It was <u>that</u> risk which materialised and resulted in the harm to the respondent (plaintiff) (at [76] per Morrison JA).

<u>Duty of Care</u>

Because of the RMPC the Council had control over the highway and control over its condition. That control creates the duty of care under which the Council was obliged to exercise reasonable care to advert a danger to safety or bring that danger to knowledge of road users who might be at risk from it (at [93] per Morrison JA).

Per Morrison JA:

> "The erection of the temporary signage was plainly a step taken by the Council workers to warn users, and in particular those approaching the floodway, that the surface of the roadway was rough and as a consequence their speed needed to be adjusted. In my view, the act of putting the signage up did at least two things. First, it was part of the performance of the obligation to exercise reasonable care to ensure that road users are safe. Secondly, it was in part performance of the obligation to manage traffic where maintenance work was to be done and warn road users of the risk posed by the road conditions (at [94]).

> I would express that duty slightly differently, but conformably with His Honour's findings. In the circumstances, the duty on the Council was to take reasonable care in carrying out maintenance work on the roadway, including installation of warning signage, so as to not create a foreseeable risk of harm to users of the roadway from developing potholes (at [96])."

The difficulty for the Council was that those erecting the temporary signs knew that there were no sandbags available yet did nothing to secure the signs in place. Several alternatives were available: "For example, as Mr Everingham (the Council's supervisor of the patching crew) accepted, the patching crew could have used any heavy weight, or a star picket (which were available at the Council's depot). Another solution was to simply affix the temporary signage to the floodway signs, which were permanent (at [104])."

Per McMurdo JA:

> "In this case, as the actions of the Council's employees demonstrated, there was a foreseeable risk of personal injury from the surface of the road being, or becoming, unfit for the passage of vehicles at what would ordinarily be a safe and lawful speed. The Council was bound to take reasonable care to avoid that risk. Pending the repair of the surface, this required the Council to erect warning signs, and to do so with reasonable care (at [130])."[1]

12. *Baker v Bunnings Group Limited* [2020] NSWDC 310 (18 June 2020) Dicker SC DCJ

Facts

The plaintiff was (then) a 67 year old lady who was injured when she attended at a Bunnings store at Port Macquarie on 25 October 2017. She intended to have three fence palings cut and reduced in size. She was crossing a concrete island with a view to entering into the timber yard at the premises. On these raised concrete islands there were items of stock such as some gas bottles, pool salt and the like.

As the plaintiff approached the timber yard entrance from the car park she saw a vehicle leaving through a boom gate so she retraced her steps, went around the island to near where the gas bottle cage was and walked across and took a step up onto the island. As she crossed the island, she did not see that there was a drop from the curb on the other side of the island close to the boom gate. She gave evidence that she thought the concrete continued without a change in height. She simply did not see or perceive the height differential. She suffered a significant injury to her ankle (which also dislocated in the incident).

Decision

Judgment for the defendant.

Ratio

A number of witnesses were called including a number of Bunnings staff members. It was said that there had been no previous incidents of the type that befell the plaintiff.

It was found by the trial judge that the plaintiff simply did not see or perceive the height differential despite her having walked around the concrete island which has a clear curb without going down a step.

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[1] **On 13.11.20, the High Court refused the Goondiwindi Regional Council's application for special leave to appeal. The application for leave focused on the breadth of Section 37 of the *Civil Liability Act*. After hearing from Counsel, Justices Nettle and Gordon were quick to refuse special leave. Justice Nettle delivered the decision in these terms:**

> **"In this matter, the Court is not persuaded that an appeal would enjoy sufficient prospects of success to warrant the grant of special leave. The application is dismissed, with costs." (at [L445-447]).**

The expert called by the plaintiff, Mr John Dimopoulos (an engineer) provided a report and gave evidence. He had been led to believe that the plaintiff's incident occurred when she "realised there was a curb present however she was not expecting that the surface was damaged and uneven". The engineer recommended that the broken section be repaired. It found, however, that the concrete island had been designed in a way that there was a differential in height and that in fact it was not damaged in the way alleged. He had regard to incorrect assumptions in providing his opinion.

The trial judge found that the duty of care was:

> "Based on the principles referred to in these cases, in my view the defendant owed the plaintiff as a customer attending a store controlled by the defendant, a duty to take reasonable care to avoid a foreseeable risk of injury to her arising from the state of the store or its car park over which a customer would traverse, on the assumption as an element contained in the scope of the duty of care, that the plaintiff would exercise reasonable care for her own safety." ([at 222]).
> "In my opinion, the relevant risk of harm in the present case was that customers of the Bunnings store walking across the concrete traffic island towards the pedestrian designated entrance of the timber yard having stepped onto the island, would not realise that there was a difference in height and a step down from the island and would fall and thereby injure themselves." ([at 224]).
>
> "Section 5 of the CLA defines "negligence" as a failure to exercise reasonable care and skill. Whether there is negligence in the present case by the defendant as pleaded must be determined considering subsection 5B and 5C of the CLA." ([at 226]).
>
> "These sections provide as follows:
>
> > "Division 2 Duty of care
> > 5B General principles
> > (1) A person is not negligent in failing to take precautions against a risk of harm unless—
> > > (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
> > > (b) the risk was not insignificant, and
> > > (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
> >
> > (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)—
> > > (a) the probability that the harm would occur if care were not taken,
> > > (b) the likely seriousness of the harm,
> > > (c) the burden of taking precautions to avoid the risk of harm,
> > > (d) the social utility of the activity that creates the risk of harm.
> >
> > 5C Other principles
> >
> > In proceedings relating to liability for negligence—
> > > (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and
> > > (b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and
> > > (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk." ([at 227]).
>
> "I consider the elements in section 5B of the CLA in the light of section 5C as applied to the present case involving the plaintiff:

1. The risk was foreseeable, that is, it is a risk of which the defendant knew or ought to have known – in my view, it was foreseeable, in the sense of being a risk of which the defendant ought to have known, that a customer of the Bunnings store may have walked across the concrete island in question and not seen or perceived the step down and variation in height of the kerb closer to the entrance. I accept the plaintiff's submission on this issue;

2. The risk was not insignificant – as the Court of Appeal made clear in *Bruce v Apex Software Pty Ltd* [2018] NSWCA 330 at [26], the question is whether the risk of harm was "not insignificant" and not whether the risk of harm was "not significant". The plaintiff submits that the risk in question was not insignificant. The defendant submits that this was not established and the risk of the plaintiff not seeing the kerb and falling was insignificant. The court had the benefit of the plaintiff's testimony, the testimony of the four witnesses called on behalf of the defendant, the report of Mr Dimopoulos and many photographs in Exhibits A and 1. As stated by Sackville AJA (with whom McColl JA agreed) in *Argo*, above, great care must be exercised in relying on photographic evidence, particularly in relation to perspective and distance. Here, however, the court had the benefit of the evidence of the various witnesses as to the photographic evidence as well as their own independent observations. I take into account all the evidence I have referred to, including the fact that there were no previous falls recorded or reported as far as the defendant's witnesses were aware. I also take into account that a person crossing the island would have taken a step up to begin with thus alerting them to the potential for a step down. I take into account the varying height of the relevant kerb and the similar colour of the kerb and the roadway beyond. I take into account the regular use of the island by patrons to access the pedestrian designated access to the timber yard. Taking all of these matters into account, in my view the risk of a fall was insignificant in the present case. This was the first time, to the knowledge of the defendant's witnesses, that anyone had fallen as the plaintiff had;

3. Whether a reasonable person in the position of the defendant would have taken the precautions indicated – I consider this issue in the light of the evidence I have already referred to. I take into account the degree of pedestrian traffic which the defendant's witnesses have indicated they observed crossing the island. I take into account the similar colour of the various surfaces and the cutaway and tapering nature of the kerb. However, all the evidence indicates that there were no prior falls at or near the vicinity of the island of which the witnesses were aware. Even taking into account Mr Dimopoulos's view and the "damage" he refers to, in my view a reasonable person in the position of the defendant in the present case would not have taken the precautions pleaded and particularised. This includes painting or otherwise delineating the kerb or preventing people walking across it in particular. I do not accept that the measures indicated in paragraph 7.14 of Mr Dimopoulos's report were steps which a reasonable person in the position of the defendant would have taken. In my view, in the light of the oral evidence and the photographs, the step down from the kerb was obvious to a reasonable person in the position of the plaintiff. The relevant senior employees of the defendant were not aware of any previous falls from the island;

4. The probability that the harm would have occurred if care were not taken – in my view the probability is very low. In my opinion it was not probable at all that a reasonable person exercising care for their own safety, having stepped up onto the island, would not have seen the stepdown from the kerb;

5. The likely seriousness of the harm – a person not seeing the kerb and falling down may involve serious injury to themselves;

6. The burden of taking precautions to avoid the risk of harm – there was not a significant burden on the defendant in taking the specific precautions which Mr Dimopoulos refers to in paragraph 7.14 of his report. This is in the plaintiff's favour. I also take into account the particulars of negligence in paragraph 15 of the Statement of Claim and the response to the request for further and better particulars which was provided by the plaintiff's solicitors dated 14 December 2019;

7. The social utility of the activity that creates the risk of harm – it is important that people have safe access to shopping stores including in the car park. This is a relevant factor;

8. The risk of injury in falling from the kerb is in my view from all the evidence obvious;

9. Taking into account all of the matters I have indicated, in my view a reasonable person in the position of the defendant in the present case would not have taken any of the precautions recommended or pleaded. There were no prior accidents recorded in evidence involving the kerb. Any person mounting the kerb closer to the disabled car spot would have reasonably expected the possibility of there being a step down. All of the defendant's witnesses said that the kerb was obvious to them. I take into account that they worked there, had crossed it many times, and when they examined it after the fall, did so with knowledge that a fall had occurred. I take into account the similar colour of the areas and the materials used. There was simply no history in evidence of any falls involving the area. In addition, I take into account my own views of the photographs in the light of the oral evidence recognising that care must be exercised in doing so. I also note the variation to the kerb by the design cutaway and the effect this has on appearance of the kerb face. In my view, the step down is readily apparent on all the evidence." ([at 229]).

"Taking into account all of the matters I have set out above, in my view there was no breach of duty of care by the defendant. I have considered each of the particulars of breach in the Statement of Claim and the report of Mr Dimopoulos in coming to that conclusion. I have also considered the various detailed submissions made by the plaintiff in favour of there being a breach in the present case." ([at 230]).

In any event, the risk of the plaintiff falling if she did not exercise reasonable care for her own safety or the obvious risk in section 5F of the CLA ([at 234]).

<u>Contributory Negligence</u>

Even if the plaintiff had been successful, a reasonable person in the position of the plaintiff should have regard to what they knew and exercised care near the entrance to the timber yard and have perceived the curb and avoided the accident. In the circumstances, contributory negligence would be assessed at 20%.

13. *Bowman v Nambucca Shire Council* [2020] NSWSC 1121 (21 August 2020) Walton J

Facts

The plaintiff sustained injuries when he slipped and fell on a boat ramp at Forster Beach in New South Wales. The defendant had the care, control and management of the boat ramp. The boat ramp was constructed with the approval of the defendant. Situated proximate to the concrete ramp was a warning sign. Prior to the accident, the defendant was aware that the boat ramp was slippery due to contamination by moss and other vegetation and had erected an area pictogram with written warning signs that the ramp was slippery. On the day of the accident the plaintiff was washing his feet in the water on the lower part of the ramp. It was known by the defendant that the ramp was not only used for

boat access, but also by pedestrians. The plaintiff brought a claim in negligence alleging that the council was under a duty to take precautions against the risk of harm. It was alleged that the risk was foreseeable, not insignificant and that in the circumstances, a reasonable person in the defendant's position would have taken precautions. The defendant argued that the precautions which it took with respect to the ramp, including a routine system of cleaning and signage were reasonable and sufficient to satisfy any obligation and further argued the availability of the defences under the *Civil Liability Act* 2002 (NSW) (CLA).

Decision

Judgment for the defendant.

Ratio

The defendant relied on statutory defences in the CLA. In particular:-

- There was no duty of care for "recreational activity" where the risk was the subject of a risk warning;
- Injured persons are presumed to be aware of an obvious risk and that there is no liability for the materialisation of an inherent risk; and
- The defendant is a public authority limited by financial and other resource constraints in exercising its functions.

The trial judge set out the recreational activity defence provisions and the legal principles behind those. The judge concluded it was uncontroversial that the plaintiff's activities at the time of the accident, namely, walking towards the beach or seawater to join his son after having afternoon tea at a picnic spot, meets the definition of recreational activities under the CLA.

The plaintiff was, at the time of the accident, engaged in a recreational purpose being a pursuit or activity engaged in for enjoyment, relaxation or leisure. The risk of slipping down the boat ramp was subject to a "risk warning" to the plaintiff. The warning sign at the entrance to the ramp contained a specific icon depicting slippery ground (with squiggles), and depicts a person slipping over onto their back and the words "slippery area". It was not necessary that the risk warning be specific to the particular risk concerned, so long as the risk warning warns of the general nature of the particular risk. It is not necessary for the defendant to prove that the plaintiff in fact received or understood the warning or was capable of receiving or understanding the warning. However, in this case, the plaintiff conceded that he was aware from previous visits as to the existence of the sign, accordingly, and pursuant to section 5M(1) of the CLA, the defendant did not owe a duty of care to the plaintiff in the circumstances of the accident to take care in respect of the risk of slipping when walking down the boat ramp. As to the risk of harm, the judge held that in the present case, the relevant risk of harm was the risk of a pedestrian might slip on the ramp and suffer physical injury. The court went on to determine whether or not it was an obvious risk, and held that in making the assessment, the court will take into account the age and level of experience of the plaintiff. The risk may be obvious, even if it has a low probability of occurring, and the plaintiff's actual knowledge of the risk of harm is irrelevant except in so far as it is relevant to the forward looking enquiry as to whether or not the risk would have been obvious.

During the course of the trial, the plaintiff conceded that he had fished from time to time as a child, had used boat ramps in many places in the past, that he had seen the boat ramp at Scotts Head before the date of the accident and knew that the boat ramp would have been covered in seawater from time to time and that vegetation can grow on it. He had also experienced his car wheels spinning on a different boat ramp because of the slipperiness and because of things that were on the ramp, and that he had seen the ramp at Scotts Head underwater from time to time and that on those occasions a ramp being wet would have been prone to being slippery and that he would approach any boat ramp on the basis that it could be slippery. The judge concluded the risk whilst walking on a marine surface such as a boat ramp due to the wetness and marine growth is a matter of common knowledge, and furthermore, the plaintiff walked behind the warning sign and commenced walking in a westerly direction and therefore had an unobstructed view of the boat ramp in daylight. The plaintiff's approach to the ramp indicated there was a downward gradient and all of these factors made the risk an obvious one.

On the issue of contributory negligence, and in case it was required, the judge held that 10% should be apportioned to the defendant and 90% to the plaintiff. Upon the findings of the court pursuant to 5M of

the CLA, as to the breach of duty and causation, the plaintiff's claim in negligence failed. The plaintiff had not established liability.

14. *Greenslade v Hiew* [2020] WADC 120 (1 September 2020) Staude DCJ

Facts

On 22 June 2013, Mr Greenslade entered into a handwritten tenancy agreement with Mrs Hiew, the property owner. Mrs Hiew had owned the premises as an investment property for around 20 years. Immediately before entering the tenancy agreement, Mr Greenslade inspected the property and gave evidence he identified numerous defects with the property at that stage, none of which Mrs Hiew resolved.

On 11 January 2015, Mr Greenslade was walking through the house when the ceiling suddenly, and without warning, collapsed onto him.

Decision

Mr Greenslade's claim was dismissed.

Ratio

Mr Greenslade argued that Mrs Hiew was under a duty to inspect the ceiling and had failed to do so – had she done so, the defects in the ceiling would have been discovered and repaired before the ceiling collapsed. Central to this argument was a determination of whether the ceiling exhibited any signs of defect or damage before it collapsed. This necessarily involved consideration of what actually caused the damage in the ceiling. Counsel for Mr Greenslade articulated the critical issue in this way:

> "In the absence of some special contractual arrangement, notice of defect or a legislative requirement, ordinarily, the landlord does not have an affirmative duty to inspect, although such a duty may arise in the special circumstances of the case".

While Mrs Hiew had never engaged any building inspector or similar expert to look at the premises to detect defects or maintenance issues, the court was willing to accept that a properly constructed ceiling would not ordinarily require repair or maintenance unless a problem became evident.

The court found that at no time before the ceiling collapsed was there any sign that the ceiling was in a dangerous state or that it needed repair. The court rejected Mr Greenslade's evidence about prior defects observed at the commencement of the tenancy – in any event, this evidence was irrelevant because the court found the damage which ultimately caused the ceiling to collapse was sustained in late 2014 as a result of severe weather events (after the inspection).

Affirming the decision of *Jones v Bartlett* [2000] HCA 56 and *Northern Sandblasting Pty Ltd v Harris* [1997] HCA 39, the court found that in these circumstances, Mrs Hiew was under no duty to inspect or repair the ceiling. There were no special circumstances that created any affirmative duty to inspect the ceiling at the commencement of the tenancy, or at any time prior to the ceiling collapse. The court concluded the ceiling collapsed without any observable sign of damage or defect.

15. *Keven Gors by his Plenary Administrator Janet Christine Gors v Tomlinson* [2020] WASCA 164 (30 September 2020) Quinlan CJ, Murphy JA and Vaughan JA

Facts

The appellant suffered significant injuries after he fell through a laserlite patio roof at a property owned by the respondents.

The appellant and the respondents were neighbours, and on the day of the accident the appellant had attended the respondents' property for the purposes of removing a Solahart hot water system from the roof of the respondents' house, so that the appellant could reuse some of the parts of the unit.

The male respondent was at home at the time of the incident, however, the female respondent was not. The male respondent played no role in planning how the appellant and his brother were to go about the task of removing the unit.

The appellant sued the respondents for damages on the basis they were in breach of their duty of care to the appellant, as occupiers of the property, by failing to warn the appellant of the risk of stepping on the patio roof. At trial, the appellant's trial was confined to that failure to warn. The appellant was unsuccessful at trial and appealed the decision.

Prior to the day of the accident, the appellant had visited the respondents' property on numerous occasions, with the judge finding that the appellant could not have been unaware the patio roof was translucent. The parties had agreed that at all material times the patio roof was unsafe to walk on.

The appellant had accessed the tiled roof of the house using a ladder. In the process of walking backwards along the tiled roof, having unbolted the unit, the appellant put the unit down. The appellant, without looking behind himself, took two steps backwards and fell through the patio roof.

The appellant relied upon a duty of care owed under Western Australian Occupiers Liability Legislation, together with the general duty of care under the *Civil Liability Act* (CLA). Ultimately, the case at trial was confined to whether the respondents owed the appellant a duty to warn of risk of harm associated with the patio roof. That risk was the risk of the appellant suffering an injury by stepping onto and falling through the patio roof.

At first instance the issue was the scope of the duty, namely whether the scope of the duty of care (existence of such a duty not being in contest) extended to a duty to warn of the risk of harm associated with the patio roof.

At trial it was submitted there were no relevant inconsistencies between the two pieces of legislation with counsel for the appellant at trial accepting the appellant's case came down to a failure to warn.

Of relevance to the trial judge dismissing the appellant's action at first instance were the provisions of the CLA dealing with obvious risk.

Specifically: -

- an obvious risk to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person (section 5F(1));

- in determining liability for damages for harm caused by the fault of a person, the person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk (section 5N(1)); and

- a person (the defendant) does not owe a duty of care to another person (the plaintiff) to warn of an obvious risk to the plaintiff (section 5O(1)).

His Honour, at first instance concluded: -

(a) the risk of harm was an obvious risk;

(b) the appellant had not proved he was not aware of the risk; and

(c) the respondents did not therefore owe a duty of care to the appellant to warn of the risk.

The judge at first instance also considered, independent of the "obvious risk" provisions of the Act, that in any event, having consideration to the *Occupiers Liability Act* and the CLA, the risk of harm to appellant was not a foreseeable risk of which the respondents were required to warn the appellant and that a reasonable person in the position of the respondents would not have warned the appellant of the risk of injury to him.

Lastly, the trial judge, in dealing with the issue of causation, determined that he could not be satisfied it was more probable than not that, but for the failure on the part of the first defendant to give a warning to the plaintiff, that the patio roof would not bear his weight, and that if he stepped onto it he could fall and be seriously injured, he would not have stepped back without looking and fall onto the patio below.

Decision

Appeal dismissed.

Ratio

In dismissing the appeal the court considered the five grounds of appeal which challenges included the findings that the risk of injury to the appellant was not foreseeable, that the trial judge erred in failing to properly interpret the provisions of the CLA concerning obvious risk, and that a warning would have had no effect in any circumstances.

The court considered the appellant's approach to the appeal ignored the learned trial judge's findings entirely.

The Court of Appeal identified: -

(a) authorities made it clear that in some circumstances a foreseeable risk is so obvious and the remoteness of the likelihood of it eventuating may be such that reasonableness may require no response to the risk at all, being what the trial judge concluded in this case;

(b) the trial judge was not in error in concluding that the risk of harm to the appellant was not a foreseeable risk of which the respondents were required to warn;

(c) there was no evidence before the court that stood in the way of the learned trial judge's finding that the risk of stepping onto the patio roof was obvious and the challenge to the finding that in the circumstances the risk of harm in stepping onto the patio roof would have been obvious to a reasonable person in the position of the appellant failed;

(d) the appellant's submission that section 5O would only be engaged where the common law defence of volenti non fit injuria is pleaded, was not supported by text, context purpose or authority; and

(e) it was open to the learned trial judge to find the appellant fell through the patio roof because he stepped backwards without looking, and as such there was no link to the failure to warn and therefore causation was not established between the failure to warn and the incident.

Accordingly, the appeal was dismissed.

16. *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 (23 October 2020) Basten JA, Payne JA and McCallum JA

Facts

On 8 January 2011, the appellant who was then 19 years old, fell from her horse while competing in a campdraft event and suffered a significant spinal injury in the form of incomplete T11 quadriplegia. The appellant alleged that her fall from her horse was caused by the negligence of the defendant organisation, the Australian Bushmen's Campdraft and Rodeo Association ('the Association') and commenced proceedings seeking damages for personal injury. At trial, the primary judge found in favour of the Association determining that the appellant had failed to show a breach of duty.

There were four issues for determination on appeal. First, whether the primary judge erred in failing to find that the Association breached its duty of care to the appellant. Second, whether the primary judge erred in finding that the injury suffered by the appellant was a result of the materialisation of an obvious

risk of a dangerous recreational activity. Third, whether the primary judge erred in finding that the Association was not liable to the appellant by reason of the volunteer defence under the *Civil Liability Act 2002* (NSW) ('CLA'). Fourth, whether the primary judge erred in failing to find that the Association was liable to the appellant by reason of the guarantee in section 60 of the Australian Consumer Law ('ACL').

Decision

Appeal dismissed.

Ratio

<u>Duty of care</u>

At the heart of the appellant's case on the appeal was the submission that the deterioration of the surface of the arena was the cause of the appellant's horse falling. It was submitted that a reasonable person in the position of the Association would have ploughed the ground in the area, stopped the competition when the ground become unsafe and/or warned the competitors that the ground had become unsafe.

At trial, the primary judge had made no finding as to the condition of the surface in the arena. The court noted that both at trial, and on the appeal, the appellant never clearly identified the way in which it was alleged the surface had deteriorated, nor had she proved that her horse had slipped because of any deterioration in the surface of the arena. The expert evidence was of no assistance on either point. The lay-witness evidence seemed to suggest that the arena surface had become slippery as it was hard and compacted, rather than soft. That, however, was contrary to the way in which the case was advanced both at trial and on appeal.

The fact that other riders had fallen earlier in the day did not establish that the surface of the area was dangerous or unsuitable. In the absence of any evidence with respect to the connection between those falls and the condition of the arena, the court considered that the appellant had not established that any earlier fall should have led the Association, acting reasonably, to stop the competition, plough the area and/or warn the competitors that the arena had become unsafe.

The court was not satisfied that the appellant had established that the surface of the area had become unsafe or that the exercise of reasonable care in all the circumstances required the event to be stopped.

<u>Obvious risk</u>

Citing with approval the approach taken in *Menz v Wagga Wagga Show Society Inc* [2020] NSWCA 65, it was reiterated that the risk referred to by section 5L of the CLA should be assessed with a reasonable level of generality. The formulation of the risk should not leave out the immediate cause or mechanism by which the injury was actually suffered. On that approach, falling from a horse describes the cause of the injury, but not the risk against which the defendant must take precautions. A formulation of the risk of harm which leaves out altogether the "true source of potential injury"[2] and the "general causal mechanism of the injury sustained"[3] is not an appropriate formulation of the risk of harm.

The appellant had formulated the relevant risk as being:

> "that she fell because her horse lost its footing due to the deterioration in the ground surface which, to the knowledge of the respondent, became increasingly unsafe in the period prior to the appellant's accident."

Whilst the court did not consider that the appellant's formulation of the risk was correct, it was determined that even if it were correctly framed, the injury suffered by the appellant was the manifestation of an obvious risk. The appellant had many years of experience and it would have been

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[2] ***Roads and Traffic Authority of New Soth Wales v Dederer*** **(2007) 234 CLR 330; [2007] HCA 42 at [60].**

[3] ***Perisher Blue Pty Ltd v Nair-Smith*** **(2015) 90 NSWLR 1; [2015] NSWCA 90 at [98].**

obvious to a reasonable person in her position that over the course of the day, the surface of the arena would have 'deteriorated', and the risk of a horse slipping and falling would have been heightened.

Volunteer defence

The primary judge had found that the protection in section 61 of the CLA could be extended to the Association, if the Association was vicariously liable.

Whilst it did not affect the ultimate outcome of the appeal, the court held that the primary judge had erred in making this finding. It was concluded that when reading Part 9 of the CLA as a whole, a volunteer' could only be a natural person. Even assuming that a body corporate was capable of being a 'volunteer' within the meaning of Part 9, the other requirements of section 61 had not been satisfied.

Australian Consumer Law

At trial, the primary judge had found that the appellant's case in contract had failed due to Her Honour being unconvinced that the documents and events identified by the appellant as comprising a contract did create any contractual relationship between the appellant and the Association.

On appeal, the appellant sought to conduct a different case in relation to the statutory guarantee in section 60 of the ACL and submitted that a contract was not necessary, and that all that was required was a supply of services in trade or commerce.

The court did not allow that argument to be run for the first time on appeal. The case conducted by the appellant before the primary judge did not encompass the allegations sought to be advanced on appeal.

Dissent

In a dissenting judgment, McCallum JA disagreed with the majority and considered the appellant's evidence that the surface of the arena had become unsafe for campdrafting was strong. Her Honour considered that the respondent had breached its duty by failing to keep the surface in a suitable condition.

Further, on the issue of obvious risk, Her Honour considered that the materialised risk must be characterised with enough particularity to enable the court to determine whether it was foreseeable by the organisers, whether it was one capable of attracting liability, and whether it would, prospectively, have been obvious to a reasonable person in the position of the appellant.

Her Honour considered that the risk as formulated by the appellant was an apt description of the risk alleged to have materialised, and found that the risk as framed would not have been obvious to a reasonable person in the appellant's position.

17. *Kleeman v The Star Entertainment Group Limited & Anor* [2020] QSC 332
(29 October 2020) Ryan J

Facts

The plaintiff commenced proceedings against the first and second defendants seeking damages for personal injury in the amount of $2.2 million. He alleged that he had sustained permanent physical damages to his spine and disc at L5/S1 on 15 November 2015 following an accident at the Jupiters Casino in the Gold Coast.

The trial commenced on 26 October 2020, and the plaintiff was self-represented.

Decision

1. The plaintiff's proceeding is dismissed.
2. The plaintiff to pay the first defendant costs on the standard basis until the end of the first day of trial, and thereafter on an indemnity basis.

3. The plaintiff is to pay the second defendant's costs on the standard basis until the end of the first day of trial, and its costs incurred on 27, 28 and 29 October on an indemnity basis.
4. The first defendant has liberty to apply (if 12 August 2019 is not the date of the last correspondence which informed the plaintiff that the first defendant was not properly a party to his proceeding).

Ratio

On the defendant's application, Her Honour dismissed the plaintiff's proceedings following a lengthy procedural history.

Over the course of the matter, the plaintiff had refused to meaningfully engage with the defendant's solicitors. The defendant's solicitors had engaged in regular and patient correspondence with the plaintiff and had attempted to point out what he needed to prove and what gaps were apparent in his pleading and his evidence.

The plaintiff had been granted indulgences by the court on many occasions in relation to the obvious deficiencies in his pleadings, to which he had defiantly refused to take any steps to meaningfully rectify in addition to his incorrect nomination of the first defendant as an appropriate party.

On the first day of the trial, it appeared to be obvious to Her Honour that the plaintiff had no idea of the elements of his cause of action, no idea of the evidence which he would require to establish each of those elements of his cause of action and no idea of the way in which a party may place evidence before a court.

After requesting an adjournment on the first day of the trial, the plaintiff informed the court that he was not well. Court was adjourned until 10.00 am the next day. The plaintiff provided the judge's associate with a pro forma medical certificate from an on-line general practitioner simply noting that the plaintiff was 'suffering from a medical condition and will be unfit to continue their usual occupation or duties for the period 27/10/2020 to 28/10/2020 inclusive'.

The next day, being 27 October 2020, the plaintiff emailed the judge's associate and the defendant's solicitors and informed that he was still unwell and was unable to attend trial that day.

After the plaintiff failed to appear by telephone on 28 October 2020, he was requested to provide a medical certificate which explained the reasons for his absence from court on 27 and 28 October 2020. To that request, the plaintiff sent the judge's associate a photograph of a box of medication.

Her Honour was not persuaded that the plaintiff was genuinely ill or unable to communicate by telephone. It was not considered that he had satisfactorily explained his absence from court, and accordingly he had failed to comply with the court's directions.

Following the plaintiff's failure to appear, the defendants applied for an order that the plaintiff's proceedings be dismissed and an order for costs on the indemnity basis. In support of their application, the defendants relied upon affidavit evidence which bore upon the merits of the plaintiff's claim. The totality of that effect of that evidence casted doubt on whether the plaintiff was disabled by an injury to his spine, and more significantly, whether it was indeed an incident at the Jupiters Casino that which caused any injury which the plaintiff may have.

Having regard to the plaintiff's approach to the litigation, the inadequacy of his pleadings, his lack of comprehension as to what is required to successfully prosecute a claim in the Supreme Court, in addition to his disrespectful response to the directions of the court, Her Honour dismissed the plaintiff's proceeding. A further order was made with respect to the defendants' costs.

18. *Dickson v Northern Lakes Rugby League Sport & Recreation Club Inc* [2020] NSWCA 294 (18 November 2020) Basten JA, White JA and Simpson AJA

Facts

The plaintiff (appellant) Mr Dickson was seriously injured in a rugby league match in 2016. He was subject to a spear tackle or dangerous throw by an opponent, Mr Fletcher. The incident was recorded on video. The evidence was that the appellant's injuries were not caused by him hitting the ground but as a result of Mr Fletcher falling on him, with his shoulder contacting Mr Dickson's face. Following the match, a complaint alleging a contravention of the laws of the game of rugby league was made against Mr Fletcher, and he eventually pleaded guilty to the charge that he engaged in a "dangerous throw".

The primary judge accepted that both Mr Dickson (the appellant) and Mr Fletcher (the defendant and the tackler) were both truthful witnesses. The judge directed himself to the critical question regarding Mr Fletcher's 'intent to injure'. During the primary judgment, the judge referred to the case of *McCracken*, which bore some significant factual similarities to the present cause. The primary judge dismissed the claim, and Mr Dickson appealed.

Decision

Appeal dismissed. The appellant to pay the respondent's costs of the appeal.

Ratio

The critical issue in this matter was, both at trial and in the appeal, that if the claim was one governed by the *Civil Liability Act 2002* (NSW) the appellant should fail due to the operation of the available defences in that Act, namely section 5L involving the materialisation of an 'obvious risk of a dangerous recreational activity'. However, if the claim were not governed by the Act, but was to be determined in accordance with the general law, then the appellant was entitled to succeed (because defences under the general law were rejected by the trial judge and the defences in the CLA would not be available to the defendant). Whether or not the CLA applied depended on whether the case fell within section 3B(1)(a) of the Act. If it did, the relevant provisions of the Act, including the defences available under section 5L, were not engaged. The appellant's case was that the civil liability of the defendant (Mr Fletcher) was in respect of an intentional act that is done by a person with intent to cause injury.

The trial judge came to the conclusion that section 3B(1)(a) of the Act was not engaged because the tackle was not effected "with intent to cause injury". Therefore, the Act and its defence under section 5L applied.

The Court held that the tackle undertaken by Mr Fletcher that resulted in the injury was an intentional act, but the critical question was whether it was done with intent to cause injury. The 'intent to cause injury' referred to in section 3B(1)(a) is the 'natural subjective intent, and recklessness is insufficient. The expression 'with intent to cause injury' is of a specific actual and subjective intention to achieve the consequence of injury. Where the harm actually suffered is the natural and probable consequence of tortious conduct, the harm lies within the presumed intention of the tortfeasor. Different questions arise where the harm actually suffered is not of the same kind as that the tortfeasor intended. References to a presumption that a wrongdoer intends the natural and probable consequences of his or her conduct are to be understood in that context only.

There was no error on the part of the primary judge in failing to apply the presumption in the context of the exclusion of the CLA in the event that Mr Fletcher was found to have intended to cause injury to Mr Dickson.

In summary, 'intent to cause injury' means actual, subjective and formulated intention to which the defendant has turned his or her mind. It does not include recklessness, imputed or presumed intention. A strict view of the meaning of 'intent to injury' is supported by the *Interpretations Act 1987* (NSW). If 'intent to cause injury' is taken to include something less than actual, subjective, intention such as recklessness, or implied or presumed intention, many sports or other recreational activities to which the CLA is clearly designed to apply would fall outside its ambit.

19. *Castle v Perisher Blue Pty Limited* [2020] NSWSC 1652 (20 November 2020) Cavanagh J

Facts

On 16 August 2014, the plaintiff sustained multiple injuries when she collided with another skier whilst skiing down the slopes of Perisher Blue. The other skier was Mr Thoms, a ski instructor who was employed by the defendant and was acting in the course of his employment at the time, although he was not providing instruction to the plaintiff. The plaintiff commenced proceedings against the defendant alleging that the collision was caused by the negligence of the ski instructor for whom the defendant is vicariously liable. She further pleaded a breach of the consumer guarantee set out in section 60 of the Australian Consumer Law ('ACL'). The defendant relied on a number of statutory defences contained in the *Civil Liability Act 2002* (NSW) ('CLA').

Decision

1. Judgment for the defendant.
2. Plaintiff to pay the defendant's costs.

Ratio

There was some dispute about the exact location of the collision and its proximity to trees and various dips in the terrain. The judge found that the most likely explanation for the accident was that Mr Thoms had turned to look behind him as he had travelled across a dip in the terrain (which had temporarily obscured his vision). Having veered to the right as he turned around, he then intersected the plaintiff's path causing the collision. It was considered that in turning around at the place at which Mr Thoms did and at the speed at which he was skiing, he failed to exercise reasonable care.

<u>Dangerous recreational activity and obvious risk</u>

The defendant relied on section 5L of the CLA as a defence to the claim in negligence against it. The plaintiff submitted that she was not engaged in a dangerous recreational activity and that the harm suffered by her was not a result of the materialisation of obvious risk of that activity.

The defendant adduced records which indicated that whilst there were approximately 600,000 visits to Perisher annually, between the years 2017 and 2019 there was an average of 64 collisions per annum. The judge considered that whilst the rate of collision per skier was low, the potential harm was high. He considered that it was not permissible to focus merely on the rate of collisions/accidents or injuries without having regard to the potential consequences. Whatever the rate of injury, it could not be said that both the likelihood of the risk of injury materialising and the nature and extent of the likely potential injury would be trivial.

The judge considered that it was common knowledge that persons have previously been killed and have suffered catastrophic injuries whilst skiing; persons participate in the activity often in close proximity to solid objects such as rocks and trees, often travelling at speeds which are very fast for non-mechanically propelled human movement.

Accordingly, it was determined that the recreational activity, which is skiing, involved a significant risk of harm.

The judge then considered whether the harm suffered by the plaintiff was a result of the materialisation of an obvious risk of the activity in which she was engaged. At trial, the plaintiff had sought to identify the risk for the purposes of considering whether it was obvious more specifically, precisely or narrowly.

The plaintiff submitted that the relevant risk was the risk of the plaintiff, an experienced and competent skier, colliding with a ski instructor. She submitted that it would not have been obvious to a reasonable person in the position of the plaintiff that she might collide with a ski instructor.

The judge considered that the difficulty with the plaintiff's characterisation of the relevant risk was that it focused on the personal characteristics of Mr Thoms, and in doing so it was an exercise conducted

entirely in hindsight rather than part foresight and part hindsight. The approach taken in Menz and Tapp required the risk to be specified with a degree of generality and therefore it was considered that the risk could not be characterised in the way suggested by the plaintiff.

The judge had regard to the fact that the plaintiff was a competent and experienced skier and at the time, was skiing on a slope which was for persons with advanced skills. It seemed that colliding with another skier would not have been something that she would have expected to happen and would not have been something which was likely to happen. It was considered, however, that it would have been obvious to a person in the position of the plaintiff that other skiers might not always be in control, visibility might be reduced for differing reasons and there could be hidden imperfections in the snow which might cause good skiers to lose control. It would have been obvious to a reasonable person in the plaintiff's position that if another skier lost control or was not doing what he or she should be doing on the slopes, a collision might ensue, and significant injury might be suffered.

Accordingly, it was found that the defendant had made out its defence to the claim in negligence under section 5L CLA.

Risk warning

The defendant pleaded that the terms and conditions of the agreement between the plaintiff and the defendant (specifically the ticket purchased by her) contained specific risk warnings. It also relied on the various risk warning signage located at numerous locations throughout the resort.

The risk warnings relied on by the defendant directed attention to the activities of skiing, snowboarding and snow tubing. Further, the warning referred to injury or loss which may result not only from the skier's own actions, but from the action, omission or negligence of others.

The judge took the view that the warnings were too general and did not identify any particular risks. It was found that a risk warning within the meaning of section 5M was not provided to the plaintiff.

Australian Consumer Law

Although it was not expressly pleaded, the defendant relied on the contractual exclusion of liability contained in the Perisher Booking Terms and Conditions. The issue to be determined was not whether the terms of the exclusion would be sufficient to exclude liability in the circumstances, but rather whether it was rendered void by section 64 of the ACL having regard to section 139A of the *Competition and Consumer Act* ('CCA').

The plaintiff submitted that the defendant failed to comply with the consumer guarantee as to due care and skill set out in section 60 of the ACL. In her pleadings, the plaintiff did not identify which services the defendant had failed to provide with due care and skill. At trial, counsel for the plaintiff submitted that part of the services provided by the defendant was the policing and implementation of the alpine code which included its observation by its employees, including Mr Thoms.

The judge considered that the contract between the plaintiff and the defendant was a contract for or in relation to the provision of or the use of enjoyment of facilities. As such, services included any rights, benefits, privileges or facilities that are or are to be provided, granted or conferred under that contract. There was no doubt that the defendant provided services to the plaintiff which conferred a right to ski, however the difficulty for the plaintiff was that it was not suggested that the defendant failed to render any of those services with due care and skill. Whilst the defendant had provided services to the plaintiff, the only failure to take care that either asserted in the pleadings or established by the evidence, was a failure to take care by Mr Thoms having regard to the way in which he was skiing at the time of his collision with the plaintiff.

The judge did not accept that the defendant was providing a service to the plaintiff through Mr Thoms at the time of the collision, and in the circumstances, it was considered that she had not established a failure to comply with the consumer guarantee set out in section 60 of the ACL.

The judge then went on to consider the effect of section 139A of the CCA, in the event that there was a finding that the defendant had failed to comply with the guarantee set out in section 60 of the ACL.

The plaintiff argued that section 139A did not apply because Mr Thoms' conduct was reckless (and thereby excluded by section 139A (4)). The judge agreed and found that Mr Thoms should have been reasonably aware that by skiing at a high speed, looking over his shoulder and then veering in a different direction, there was a risk that his conduct could have resulted in personal injury to another person. Mr Thoms had engaged in that conduct despite the risk and without adequate justification.

Accordingly, the judge found that section 139A (5) would have applied and the defendant could not have relied on the exclusion in the contract as a means of avoiding liability for a failure to comply with the guarantee set out in section 60 of the ACL.

NB: In Queensland, the outcome may have been different (not that much skiing happens in the Sunshine State!). The analagous provisions of the Queensland *Civil Liability Act* are found in Division 4. Pursuant to section 17 of the Queensland CLA, it provides:

> 17 Application of div 4
>
> (1) This division applies only in relation to liability in negligence for harm to a person resulting from a dangerous recreational activity engaged in by the plaintiff.
>
> (2) This division does not limit the operation of division 3 in relation to a recreational activity.

As was observed by North J in *Ireland v B&M Outboard Repairs* [2015] QSC 84, while it was not necessary for him to decide the issue, he was inclined "to the view that because of the distinction maintained in the CLA, SS17, 18 and 19 do not have an application in respect of a cause of action based on a breach of contract".

20. *Arndell BHT Arndell v Old Bar Beach Festival Incorporated; Cox v Mid-Coast Council* [2020] NSWSC 1710 (1 December 2020) Rothman J

Facts

On 1 October 2011, Paul Cox was flying a light aircraft. The plane departed from Taree Airport and flew to the Old Bar Airstrip in New South Wales. The pilot went to land the aircraft from the north of the Airstrip, first doing a planned and deliberate "touch-and-go" manoeuvre where he touched the aircraft down on the airstrip for a moment and then took off again. This was done to assess the runway because it was grass and it had been raining and, as such, the pilot wanted to ensure it was not slippery. On the pilot's second approach from the north of the airstrip, the pilot intended to land the plane but, instead, took off again, veering to the left. As he did, the aircraft collided nose-first with a Ferris wheel at the annual Old Bar Festival.

The Old Bar Airstrip was operated by the Council through a Committee. The Festival organiser had applied to the Council to use the Council land adjacent to the airstrip for the Festival, which was approved. Further, the operator of the Ferris wheel made their own application to Council to operate the Ferris wheel and a Council worker inspected the Ferris wheel after erection and did not require it to be moved, although he had the authority to request for that to occur. The President of the Committee also observed the Ferris wheel in its location, so the Council was aware of the location.

The plaintiff, Amber Arndell, who was 13-years-old at the time, was seated in a gondola on the Ferris wheel with her 10-year-old brother when the aircraft collided with the Ferris wheel. There was a period of time where they were trapped on the Ferris wheel awaiting rescue. The plaintiff brought an action in negligence against the Council and the pilot for the psychological injuries suffered as a result of the collision. The pilot also brought a cross-action in negligence against the Council for psychological injuries suffered. The issues for determination by the Supreme court of New South Wales were the relative negligence of the Council and the pilot, the extent of the damage suffered by the plaintiff and whether that was caused by the collision or the effect of the collision on the plaintiff, and whether the Council caused the pilot's injuries.

Decision

Judgment for the plaintiff in the sum of $1,513,023.30. Orders that the pilot contribute 35% of the damages and costs and the Council be responsible for the remainder. The pilot's proceedings against the Council were dismissed.

Ratio

In determining whether the defendants were liable for damages, the court had to consider the relationship between the airstrip committee and the Council, the responsibility of the Council for the location of the Ferris wheel, the location of the Ferris wheel and its position in relation to the airstrip and the precautions taken by the pilot before trying to land. The court accepted evidence that the Ferris wheel was 20 metres in height and that the upper quadrant which the plane collided with was within the obstacle clearance 'splay' of the plane. Evidence was given that the pilot had conducted a flyover of the Airstrip prior to landing and had noticed a mass of colours on the perimeter but did not see the Ferris wheel. The pilot also gave evidence that he did not see the Ferris wheel during the first "touch and go". The pilot also gave evidence that he had pulled out of the attempt at landing because he realised the landing would be unsuccessful. The court considered evidence that the position of the plane in the first attempt at landing was not conducive to a successful landing and the aircraft's brakes would likely have locked up and caused it to skid on the grass and hit the fence on the end. Expert evidence was put forward that the pilot was either flying too high or too fast on his landing approach and he would not have been able to safely land. The court found the plane was then lower than it ought to have been for a safe take-off and it immediately banked to the left when it took off from the second "touch and go". His Honour found that these points demonstrated less than competent airmanship and contributed to the cause of the collision. He did, however, agree that the pilot had not been able to observe the Ferris wheel when he did his flyover. On that basis, His Honour found the pilot to be partly responsible for the damage suffered by the plaintiff.

The court then had regard to the responsibility of the Council for the location of the Ferris wheel. The court found that the second contributing factor to the collision occurring was the location of the Ferris wheel, being within the splay of the southern end of the runway. The Council accepted that it had permitted the festival to be held on Council land adjacent to the airstrip. The Council had control over whether the festival was held and further whether the Ferris wheel was operated and its location. The court heard evidence that a Council officer had examined the Ferris wheel after it was put up and, despite his authority to request it be moved, he did not do so and saw no issue with its location. The court also heard evidence that the President of the Committee also observed the Ferris wheel in its location, so the Council was aware of the location. The Council was also responsible for the care, control and management of the airstrip (through a Committee) and was aware of the regulations surrounding the landing and take-off requirements in order for an aircraft to land or take-off safely at the airstrip. The court ultimately found that the Council had approved the application by the festival and the operator of the Ferris wheel without having regard to the risk of harm associated with placing the Ferris wheel in the splay of the airstrip. It was found that the risk of harm was reasonably foreseeable and that, but for the negligence of the Council, the plaintiff's injuries would not have occurred. The court found that the cause of the plaintiff's incapacity arising out of her psychological injuries was the trauma from the collision and that, because of the incident, the plaintiff was unemployable. His Honour awarded the plaintiff $1,513,023.30 in damages, with the pilot liable for 35% of those damages and the Council liable for the remainder. His Honour dismissed the pilot's proceedings against the Council.

21. *Belmont v McDonalds Australia Limited* [2020] QDC 319 (11 December 2020)
Horneman-Wren SC DCJ

Facts

On 9 October 2016, the plaintiff fell onto the ground whilst walking through the carpark to the entry of a McDonalds restaurant. Immediately before her fall, she was stepping off a cement tyre stop and had intended to step onto the concourse outside the store entry.

As she attempted to break her fall, she extended her left arm and consequently sustained a fracture of her proximal left humerus.

The plaintiff commenced proceedings against the defendant alleging that her fall was caused by the defendant's negligence. Amongst other allegations, she alleged that the defendant failed to ensure that there was sufficient lighting from the carpark towards the restaurant so that customers could judge the distance between the parking bollard and the concourse of the restaurant.

Ultimately, the case turned upon the condition of the lighting in the carpark, and any risk that such lighting created, and whether the plaintiff's fall was caused by that risk or by her own inattention.

Decision

Judgment for the defendant against the plaintiff.

Ratio

At trial, video footage was played to the court with the judge taking the view that it provided the most accurate evidence as to what had occurred. Contrary to the plaintiff's pleaded case, the judge found that she was looking at or in her handbag at the time her feet made the passage from the tyre stop towards the concourse. As a consequence, the judge took the view that the plaintiff had simply failed to pay attention to where she was stepping and had fallen as a result. It was noted that at the time at which the plaintiff fell, the lights in the carpark of the restaurant were defective and were not working. However, the judge concluded that whilst the lighting in the relevant area was inadequate, he was not convinced that the plaintiff's fall was caused by such inadequacy or any risk created by it. It was held that the plaintiff had failed to establish that the defendant had breached its duty to her, and as a consequence her claim was dismissed.

22. *Hubbard v CPB Contractors Pty Ltd (No 2)* [2020] NSWSC 1922 (31 December 2020) Cavanagh J

Facts

The plaintiff was a security guard who was required to patrol a premises occupied by the defendant. This involved patrolling compounds along the Pacific Highway between Coffs Harbour and Woolgoolga. In the early hours of the morning of 5 October 2011, the plaintiff attended one of the compounds. During the course of that patrol, part of an access gate had blown open in the wind. To secure that gate, he was required to leave the road and walk across an area of vegetation and long grass and in doing so, he used his torch for illumination but was not shining it directly on the ground. As he was doing so, the plaintiff fell in a ditch and injured his knee and back.

The defendant maintained the ditch was always protected with webbing and that there was a post which would prevent the gate from swinging open as alleged by the plaintiff – allegations which were denied by the Plaintiff.

Decision

Judgment was awarded in favour of the plaintiff in the sum of $1,212,281.

Ratio

There were some discrepancies in the various versions given by the plaintiff during the course of the claim but His Honour highlighted that caution must be exercised in making any decisions based on histories recorded by medical practitioners. It is not unusual that there is some variation in the histories given and, in this case, the histories given were simply a variation on a theme – the theme being that the plaintiff fell in a ditch.

His Honour accepted the injury as alleged by the plaintiff – that is, the ditch was not guarded by webbing and pickets as alleged by the defendant's witnesses. This finding was supported by photos taken sometime afterwards which revealed the absence of such precautions. The logical conclusion was that it would have been difficult to understand how the plaintiff could have fallen into the ditch if it was so protected. It naturally followed that the risk of the plaintiff falling or walking into the ditch while closing

the gate was reasonably foreseeable to the defendant because the defendant says it secured the area to prevent workers from walking that area.

His Honour rejected the defendant's argument the injury involved an "obvious risk" because the ditch was obscured by grass and vegetation and was difficult to see in the dark.

Accordingly, His Honour concluded the defendant breached its duty of care by failing to ensure that area around the ditch was cordoned off or barricaded to prevent people from walking into it.

The defendant alleged the plaintiff contributed to his injuries through his own negligence because he did not properly use his torch by shining it upwards rather than along the ground. This argument was rejected because the plaintiff was using the torch for the things that he needed to look for (i.e. the gate).

CONCLUSION

The 2020 calendar year has been, to say the least, an unusual one. The numbers of cases of the type I report on annually are lower than ever with only 22 decisions that I could find. The record low number could be a consequence of the impact on our judicial system caused by lockdowns and restrictions – or it could be part of a systemic shift towards mediation and alternate dispute resolution processes. The favourable trend for defendants, however, has continued with defendants ultimately being successful in about 59% of cases. In New South Wales, defendants were spectacularly successful winning almost 67% of the cases they contested.

It remains to be seen whether this trend will continue in a more "normal" year in 2021 – but we'll have to wait for next year's State ALA conference to find out for sure!

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