

NOT TO BE TOO PEDANTIC... BUT WHAT EXACTLY IS A DANGEROUS RECREATIONAL ACTIVITY?

David Thorpe and Pam Stewart¹

*This article examines the defence to a claim in negligence which is provided by Section 5L of the Civil Liability Act 2002 (NSW). The section was enacted as part of the extensive reform of tort law in New South Wales following the Review of the Law of Negligence Final Report, in late 2002 (the Ipp Report). The section provides a complete defence where a plaintiff is injured by an obvious risk of a dangerous recreational activity. Similar provisions exist in other states' tort law reform legislation. This article examines in detail the decision of the New South Wales Court of Appeal in *Fallas v Mourlas*, the leading case so far in New South Wales, on the interpretation and application of section 5L and, in particular, the manner in which the Court of Appeal interpreted the key words used in the section. The definition of a dangerous recreational activity as one which involves a significant risk of physical harm is crucial to the application of the defence and the authors conclude that the interpretation of those words by Ipp JA in the New South Wales Court of Appeal is problematic. The authors consider some relevant rules of statutory interpretation as well as relevant parts of the Ipp Report and other decisions in the Supreme Court of New South Wales and Court of Appeal concerning the 'dangerous recreational activity' defence. The authors conclude that the circumstances in which the defence will be available are far from certain and that further appellate consideration of section 5L or legislative amendment is needed.*

Introduction

The New South Wales Court of Appeal in the case of *Fallas v Mourlas*² provides a construction to the 'dangerous recreational activity' sections of the *Civil Liability Act 2002* (NSW) that will, almost inevitably, require parliamentary redrafting. In addition there is reason to suspect that the interpretations arising from the judgment will, rather than curtail litigation, actually encourage it.

This article is a deconstruction of the 'dangerous recreational activity' provisions of the *Civil Liability Act 2002* (NSW) as applied in the judgment of *Fallas v Mourlas*. The article also considers the extent to which the construction given to 'dangerous recreational activity' in *Fallas v Mourlas* has influenced subsequent

¹ David Thorpe is a Lecturer in the Faculty of Law at the University of Technology Sydney.

Pam Stewart is a Lecturer in the Faculty of Law at the University of Technology Sydney.

² [2006] NSWCA 32, March 2006.

cases. Parts of the article may appear to cover similar ground but given the technical nature of the sections dealt with, we believe some reiteration will assist in clarifying any difficult points. Whilst reference is made to methods of statutory interpretation, this article is not intended as a treatise on this area of law.

It is of particular interest that the leading judgment in *Fallas v Mourlas* was delivered by Appeal Justice Ipp, who was of course, the chair of the Law of Negligence Review Panel appointed by the Commonwealth Government in 2002 to undertake a ‘principles based review’ of the law of negligence. The *Review of the Law of Negligence Final Report*³ contained various recommendations regarding injury to voluntary participants in recreational activities and was relied upon by the various Australian state legislatures in enacting their tort law reforms. The judgment of Ipp JA in the New South Wales Court of Appeal therefore demands particular attention.

The issues of interpretation raised in the Court of Appeal in *Fallas v Mourlas* and subsequent cases are instructive too, in respect of equivalent or similar provisions in other Australian jurisdictions following the widespread tort law reform in recent years.

A particular focus of the present discussion is the Court of Appeal’s interpretation of the words “significant risk of physical harm” used in the New South Wales legislation to define what is a “dangerous recreational activity”. Similar definitions are used in other Australian States⁴.

The “Dangerous Recreational Activity” Provisions of the *Civil Liability Act 2002* (NSW)

New South Wales

Under s. 5L of the *Civil Liability Act 2002* (NSW) a person is not liable in negligence for the materialisation of an obvious risk of a dangerous recreational activity.

Section 5L reads:

³ 2 October 2002 available at www.treasury.gov.au.

⁴ S.5H *Civil Liability Act 2002* (W.A.); s.20 *Civil Liability Act 2002* (Tas);s19 *Civil Liability Act 2003* (Qld); ss4, 5 & 6 *Recreational Services (Limitation of Liability) Act 2002* (SA); s.68A *Consumer Affairs and Fair Trading (Amendment) Act 2003* (NT).

“A person (the defendant) is not liable in negligence for harm suffered by another person (the plaintiff) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff”.

Section 5F(1) defines an obvious risk:

“For the purposes of this Division, 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 5K defines a dangerous recreational activity:

“dangerous recreational activity means a recreational activity that involves a significant risk of physical harm”.

Section 5K also defines a recreational activity as being:

- “(a) any sport (whether or not the sport is organized activity), and*
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and*
- (c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport n any pursuit or activity for enjoyment, relaxation or leisure”.*

The ‘Dangerous Recreational Activity’ Provisions in Other States

The New South Wales provision dealing with the materialisation of obvious risks of dangerous recreational activities has been repeated in some other Australian jurisdictions in various forms, in some instances virtually identical to the NSW form.

The Tasmanian *Civil Liability Act 2002* provides in Section 20:

“(1) A person is not liable for a breach of duty for harm suffered by another person (“the plaintiff”) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.”

Section 19 of that Act provides the following definition:

“‘dangerous recreational activity’ means a recreational activity that involves a significant degree of risk of physical harm to a person;

...

‘recreational activity’ includes-

- (a) any sport (whether or not the sport is an organised activity); and*
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure.’”*

The West Australian *Civil Liability Act 2002* provides in Section 5H:

“No liability for harm from obvious risks of dangerous recreational activities

- (1) A person (the “defendant”) is not liable for harm caused by the defendant’s fault suffered by another person (the “plaintiff”) while the plaintiff engaged in a dangerous recreational activity if the harm is the result of the occurrence of something that is an obvious risk of that activity.”*

Section 5E of that Act provides the following definition:

“‘dangerous recreational activity’ means a recreational activity that involves a significant risk of harm;

...

‘recreational activity’ includes-

- (a) any sport (whether or not the sport is an organised activity);*
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure; and*
- (c) any pursuit or activity engaged in for enjoyment, relaxation or leisure at a place such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.”*

The Queensland *Civil Liability Act 2003* provides the following defence:

“Section 19 No liability for personal injury suffered from obvious risk of dangerous recreational activities

- (1) *A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the person suffering harm.*

A dangerous recreational activity is defined in section 18 as:

“an activity engaged in for enjoyment, relaxation or leisure that involves a significant degree of risk of physical harm to a person.”

In South Australia, the *Recreational Services (Limitation of Liability) Act 2002* provides for the registration of codes of practice governing the provision of recreational services and enables a registered provider of such services to enter into contracts which modify duties of care owed to consumers in accordance with the registered code. Section 3 of the act defines “recreational services” as:

“services that consist of participation in –

- (a) *a sporting activity or similar leisure-time pursuit; or*
- (b) *any other activity that-*
 - (i) *involves a significant degree of physical exertion or physical risk; and*
 - (ii) *is undertaken for the purpose of recreation, enjoyment or leisure”.*

The Commonwealth *Trade Practices Act 1974* through s68B allows a term of a contract for the supply by a corporation of recreational services to exclude restrict or modify certain statutory warranties including that the services be provided with due care and skill. Recreational services are defined as “services which consist of participation in ... any...activity that involves a significant degree of physical exertion or physical risk”. A provision in almost identical terms appears in s68A Northern Territory *Consumer Affairs and Fair Trading Act* and also in s32N Victorian *Fair Trading Act 1999*.

A common feature of all these provisions is the definition of recreational activity. In each provision it is expressed to include activities which involve significant risks. The definitional words used are very similar to the wording of the NSW section. All refer to a significant degree of risk of harm. The slightly different versions of the phrase do not appear to alter the essential notion embodied in the

definitions and do not avoid the issue of whether the requirement of significance qualifies the degree of risk alone or both the degree of risk *and* the harm.

The New South Wales Provisions - Discussion

To avoid liability for a negligent act a defendant must establish that the injury to the plaintiff resulted from an “obvious risk” arising out of the “dangerous recreational activity” in question. Clearly under s5L, the “obvious risk” that materialises causing the injury to the plaintiff cannot include a non-obvious risk. Whilst this may outwardly appear a circular statement there are of course, a number of injuries that can result from a risk associated with a dangerous recreational activity that would not, in fact, be obvious. The wording of section 5L appears to allow for the segmentation of the relevant recreational activity into obvious and non-obvious risks. Further, the materialised ‘obvious risk’ in consideration must exist within, or be a part of, ‘a dangerous recreational activity’. Therefore the section would exclude an injury that results from the materialisation of a risk that was ‘collateral’ to, rather than an integral part of, a dangerous recreational activity.

Quite clearly any argument where s5L is relied upon, even at the initial stages, will focus upon whether or not the recreational activity in question was “dangerous” or ‘non-dangerous’. Furthermore the section requires consideration of whether the risk that materialised was one that was ‘obvious’ as part of the recreational activity in question.

The operative wording of s5L is given definition through s5F (1) and s5K.

Section 5F (1) defines an obvious risk as one that is obvious to a “reasonable person in the position of that person”. Therefore there are two parts to the definition: the obviousness of the risk must be apparent to a ‘reasonable person’ and that reasonable person must view the obviousness of the risk from the position of the injured party

Section 5K defines a “dangerous recreational activity”. Of course defining such an activity requires giving meaning to both the expressions a “recreational activity” and “dangerous”. Section 5K defines a recreational activity quite broadly and is unlikely to be the cause of intricate debate, however, the word “dangerous” (as it attaches to “recreational activity”) is given definition by the phrase “involves a significant risk of physical harm”. It appears from the judgment of Ipp JA in *Fallas v Mourlas*, that this phrase is likely to be the source of some disputation.

“Significant risk of physical harm”: a construction based upon natural meaning and ordinary grammar.

On an ordinary construction of the wording of the s5K definition, an activity would be considered dangerous where the “risk” was “significant” that “physical harm” would result. The section merely requires, from a simple reading, that the risk of harm is significant; that is, it is the “risk” that must be “significant” as opposed to the harm. The adjective “significant” describes the noun “risk” quantifying the level of risk that is needed to attend a recreational activity before the defence is available.

The construction above appears to be the most natural and grammatically safe construction of s5K. On such a reading of the section the defence is operable were a recreational activity involves a significant (in context; noteworthy, important, consequential)⁵ risk that physical harm will result.

For example, if there is a significant or high risk of physical harm materialising in a game of rugby football then the section would operate to furnish a defence to a charge of negligence, where the plaintiff is injured as the result of the materialisation of an obvious risk in that game.

Despite the availability of this ordinary construction to s5K, the New South Wales Court of Appeal, in *Fallas v Mourlas*, appears to have avoided it.

The New South Wales Court of Appeal Decision in *Fallas v Mourlas*

The Facts

Con Fallas shot his friend Con Mourlas in the leg on a hunting trip near Bathurst, New South Wales. The friends were night shooting for kangaroo by spotlight with two other companions. The shooting party entered the bush around 10pm and at about 10:30pm. Mourlas agreed to hold the spotlight from the front passenger seat of the vehicle whilst Fallas drove, and the others, walking in front of the vehicle, shot for kangaroo. At some point Fallas stopped the car and, armed with a hand-gun, joined the others to shoot at kangaroos illuminated in the light from the spotlight still held by Mourlas. When Fallas returned to the vehicle some time later he was still holding the hand-gun. Mourlas asked him not to enter the vehicle with the loaded gun. Fallas replied, “there’s nothing, it’s alright, it’s alright. ... I know what

⁵ The Australian Concise Oxford English Dictionary 3rd Ed. Oxford University Press, Australia, 1999

I'm doing, I've got a licence." Reassurances of this type were given several times to Mourlas. Fallas did in fact enter the car and proceeded to exercise the gun, which had apparently jammed, by "clocking it back and forward". Mourlas asked him to, "do it outside". Fallas remained in the vehicle and as he continued to attempt to free the jammed gun he pointed it in Mourlas' direction. The gun discharged, the bullet striking Mourlas in the leg causing severe injury.

At Trial

Fallas relied on s5L of the *Civil Liability Act 2002 (NSW)* by way of defence. Section 5L removes liability from a tortfeasor for negligence where the harm suffered to the plaintiff arises from the materialisation of an obvious risk of a dangerous recreational activity. A curious manifestation arising from s5L of the *Civil Liability Act 2002 (NSW)* is that the defendant, rather than pleading that the injury to the plaintiff resulted from an unforeseeable risk, may now plead, to remove liability, that, not only is the risk foreseeable, it is also obvious.

The defence failed in the District Court of New South Wales where Quirk DCJ found that the recreational activity was not one that was a "dangerous recreational activity" and that Mourlas in fact "did not suffer harm as a result of the materialisation of an obvious risk of a 'dangerous recreational activity'"⁶. Fallas appealed these two findings of Quirk DCJ to the New South Wales Court of Appeal

On Appeal

A successful appeal by Fallas would have required a finding that the activity in question was a dangerous recreational activity and, in addition, that the risk that materialised was an obvious risk of that recreational activity.

The majority (Ipp and Basten JJA, Tobias JA dissenting) found for the respondent (plaintiff) Mourlas, dismissing the appeal of Fallas.

Ipp JA, held that whilst the activity was indeed a dangerous recreational activity his Honour dismissed the appeal, finding that the injury to Mourlas was the result of negligence so "gross" as to place it outside that which could be considered an "obvious risk" under s5L. Although negligence may be obvious, his Honour took the view that gross negligence, as distinct from negligence per se may not be obvious. Further His Honour held that the word "significant" in "significant risk of

⁶ [2006] NSWCA 32 at 9

physical harm” sets a standard between “trivial” and “likely to materialize” and that a “significant” risk within s5K may be different from an “obvious” risk within s5L. Ipp JA took the view that particular activities may be segmented from the main activity for purposes of the section. He found that holding the spotlight was distinguishable from shooting or entering and leaving the vehicle. As regards ‘significant risk of physical harm’ his Honour held that the activity in question, entering and leaving the vehicle with a loaded gun, did carry such a risk and was therefore “dangerous” within s5K.

Basten JA dismissed the appeal finding that the recreational activity, night shooting, was not a “dangerous recreational activity” for the purposes of s.5L of the Act and that the risk that materialised was not an “obvious” risk of that particular activity. His Honour’s conclusions focused on the fact that the appellant/defendant had failed to adduce evidence to establish that the activity was dangerous. He held that the burden of proof of establishing a defence under s.5L falls on the defendant and that the defendant had failed to discharge that burden. Basten JA found that holding the spotlight was part of the activity in question but that “significant” risk requires identifying the seriousness of the harm on an objective test not dependent on the plaintiff’s actual awareness of the risk. His Honour held that whilst there was a risk of accidental discharge of the gun that event may be too far removed from the activity in question to be considered an obvious risk attending it.

Tobias JA allowed the appeal holding that there was a significant risk of physical harm and that the plaintiff had been injured by the materialisation of an obvious risk of the recreational activity in question. Tobias JA defined a “significant risk” as one which lies between trivial risk and a risk likely to materialise. His Honour held that a determination of whether a risk is significant involves identifying the particular activity in question and the circumstances in context. The circumstances of the shooter’s inexperience and possible bravado created a significant risk of physical harm sufficient so as to create a dangerous recreational activity. Tobias JA stressed that identification of an “obvious” risk requires regard to be had to all the particular circumstances of the activity engaged in by the plaintiff and then a determination as to whether the risk would have been obvious to a reasonable person in the position of the plaintiff. Tobias JA found that in the present case, on an objective view, the act of defendant, Fallas, entering the vehicle with the loaded gun, carried with it a risk that the gun would be discharged causing serious harm.

The Application of the Relevant Section in the New South Wales Court of Appeal

Ipp JA's Construction in Fallas v Mourlas.

Section 5K defines a “dangerous recreational activity” as being an activity that ‘involves a significant risk of physical harm’ and, on its face, presents little doubt as to its meaning. And yet, despite this simple wording, significant doubt as to the correct construction of the section has arisen through the judgments in *Fallas v Mourlas*.

Justice Ipp in his judgment states that “the deceptively simple wording of s5K conceals difficult questions of construction.”⁷ Alternatively it may be suggested that, to avoid difficulties of application, the section should be applied in accordance in its natural and ordinary grammatical construction. .

The judgment of Justice Ipp considers in detail the interpretation of the words in s5K and it is submitted that his Honour’s construction of s5K is at such variance to the ordinary meaning of the words as to fundamentally alter its natural application.

In interpreting the words ‘significant risk of physical harm’ in *Fallas v Mourlas*, Justice Ipp quotes the following from his judgment in *Falvo v Australian Oztag Sports Association*⁸ (with which Hunt AJA and Adams JA agreed):

*“In substance, it seems to me, that the expression constitutes one concept with the risk and the harm mutually informing each other. On this basis the “risk of physical harm” may be “significant” if the risk is low but the potential harm is catastrophic. The “risk of physical harm” may also be ‘significant’ if the likelihood of both the occurrence and the harm is more than trivial. On the other hand, the “risk of physical harm” may not be ‘significant’ if, despite the potentially catastrophic nature of the harm, the risk is very slight.”*⁹

The extract above appears to suggest three possible constructions giving rise to three different applications of s5K.

We shall consider the three suggested constructions separately.

⁷ at para 10

⁸ [2006] NSWCA 17 at 30

⁹ at para 12

Firstly,

“On this basis the ‘risk of physical harm’ may be ‘significant’ if the risk is low but the potential harm is catastrophic.”¹⁰

For convenience this will be called the “significant harm” construction because the emphasis is on the level of harm – the risk may be low but if the harm is “catastrophic” the risk will be deemed “significant”. Under this construction the word ‘significant’ describes the level of “physical harm”, in such a way that the section is enlivened where the level of harm is high or as described, ‘catastrophic’.

Secondly, in the same passage Ipp JA offers a different construction to section 5K, where the word ‘significant’ modifies both the nouns, “risk” and “harm”, stating:

“The ‘risk of physical harm’ may also be ‘significant’ if the likelihood of both the occurrence and the harm is more than trivial.”¹¹

This will be called the “combined construction”. Under this construction *both* the “harm” and the “risk” (apparently in combination) are seen as requiring some level of significance before the defence is available. Here “occurrence” appears to be used to describe the level of “risk”. Ipp JA indicates that this construction is “also” available, thereby suggesting that the construction operates in addition to the above named “significant harm” construction. The potential dual application as propounded in this ‘combined construction’ is particularly problematic. Does it mean that if both the likelihood of harm occurring is more than trivial and the harm that results is also more than trivial, an activity will be dangerous?

The word “occurrence” apparently refers to the likelihood of an event capable of causing harm actually happening. As such His Honour’s words would mean, “... if the likelihood of both the occurrence of an act that will cause physical harm and the level of harm which could occur”, is “more than trivial”, then the risk of harm is “significant”.

The words used under this construction mean that a “significant” risk of harm can only result through a combination of the two elements “occurrence” and “harm”, as expressed through the words, “the likelihood of *both* ...”. Under this application it is quite possible then, for an event that is unlikely to occur and which has no real potential to produce serious physical harm if it did eventuate, to constitute a dangerous activity. So in effect the combination of two relatively innocuous (but

more than trivial) possibilities can combine to create a dangerous recreational activity.

Thirdly, Justice Ipp, states:

*“On the other hand, the ‘risk of physical harm’ may not be ‘significant’ if, despite the potentially catastrophic nature of the harm, the risk is very slight...”*¹²

We shall call this the “significant risk” construction (or alternatively the ‘not-significant risk’ construction). Here a ‘very slight’ risk does not enliven the section although a “significant” risk, can. Again, “significant” is being applied in such a manner that it focuses on the level of risk as opposed to the level of harm. This then suggests that although there is a risk of ‘catastrophic’ harm, where the likelihood is ‘very slight’ the section will not be available as a defence. Arguably then, when the negative is removed, a risk that is significant (as opposed to very slight) will enliven the defence.

Consequently then, according to Ipp JA, there are three means by which a “significant risk of physical harm” can be interpreted to give meaning to the section; firstly, where the harm caused is significant, secondly, where the combination of risk and harm is more than trivial, or thirdly, where the risk level is significant. Each may apply to a single fact situation.

It may be worth noting, with some peril in appearing to nitpick, that Ipp JA places quotations around the “risk of physical harm”. This construction of s5K reveals an apparent contradiction. Ipp JA states, “the ‘risk of physical harm’ may be ‘significant’ if the risk is *low* but the potential harm is ‘catastrophic’” - he then states the “risk of physical harm” may not be “significant” if, despite the potentially catastrophic nature of the harm, the risk is *very slight*.’¹³ (emphasis added)

Both these passages address “the risk of physical harm”. According to Ipp JA if the risk is “low” but the possible harm catastrophic, the defence will be available. This is then compared to a situation where the “risk of physical harm” is “very slight” but the possible harm catastrophic and the defence is *not* available. Does this construction in reality reveal a contradiction?

¹² at para 12

¹³ at para 12

The two different outcomes appear to hang on the meaning of the words “low” and “very slight”. It seems that the difference between the two is largely indiscernible and yet, it may create two propositions which are so contradictory as to render one of the applications meaningless and, as such, unsustainable alongside the other.

To reiterate, according to Ipp JA, where the “risk of physical harm” is being considered, if the risk is “low” but the potential harm is “catastrophic”, the activity is deemed to be “dangerous” and the defendant is able to rely on s5L to remove liability. Alternatively, where the risk is “very slight”, but where the potential damage is catastrophic, the activity is deemed *not* to be “dangerous” and the defendant does *not* have s5L available. Certainly it is questionable that the operative phrases of the definition can indeed ‘inform each other’ in this way.

In Micro-View: Justice Ipp’s Construction of Section 5K

To be sure of correctly analysing Justice Ipp’s approach let us break the paragraph into its components. Firstly His Honour states:

“On this basis the ‘risk of physical harm’ may be ‘significant’ if the risk is low but the potential harm is catastrophic.”

Ipp JA compounds “risk of physical harm” into a single term or concept, as if mathematical brackets were placed around the phrase, and then applies the adjective “significant” to the entire phrase. If it were to be described ‘mathematically’ it would appear thus:

[significant (risk of physical harm)].

It seems clear that this construction is applying the adjective “significant” to the whole phrase. As such, the word “significant” has no value until a value is placed upon the compounded phrase. Therefore, where the risk is low but the harm is great the compounded concept “risk of physical harm” is seen to be significant. That is, where the phrase “risk of physical harm” is given a value such that it reads; “low risk of catastrophic physical harm” the phrase will be deemed to be “significant” and the defence will be available.

According to Ipp JA, the defence operates where, in a given recreational activity, the risk of physical harm is low and where there is “potential” for “catastrophic” harm.

Consider now the final sentence from the paragraph:

“On the other hand, the ‘risk of physical harm’ may not be ‘significant’ if, despite the potentially catastrophic nature of the harm, the risk is very slight.”

Again “risk of physical harm” is compounded. When will this “risk of physical harm” not be significant? When “the risk is very slight”. Continuing the ‘mathematical’ theme, this would read:

[not significant (very slight risk although potentially catastrophic harm)].

Hence it seems that what is meant to be communicated is that, where the “risk” is low (not significant) then despite the potential for catastrophic harm, the defence of “dangerous recreational activity” will not be available.

It may be suggested that the grammatical difficulties giving rise to these apparent inconsistencies occur because Ipp JA is attempting to force a wider application into s5K than the ordinary use of grammar permits. This will be considered in greater depth shortly.

Do these diverse constructions have any real impact?

These approaches to construction of the relevant sections potentially allow for an extremely wide, and arguably unintended, application particularly where the “significant risk” and the “significant harm” applications are compared.

To illustrate, consider a rugby scrum that collapses due to the negligence of a front rower (or even the referee) and results in catastrophic injury to another front rower (on the same team or opposition). The negligent front rower responsible claims immunity from liability because, the packing of rugby scrums is a “dangerous recreational activity”. For the negligent player to be successful in avoiding liability he or she will have to show that, in packing into a rugby scrum, there was a significant risk that physical injury would materialise. That is, the phrase “significant risk of physical harm” determines whether the exemption operates or not (subject to the need for the risk which materialises to be “obvious”).

Each of the applications discussed above potentially produces an entirely different outcome in respect of the negligent act. To continue with the example of the negligently collapsed rugby scrum: One must consider that literally hundreds of thousands¹⁴ of scrums are packed in Australia each year there are very few

¹⁴ Note that s5F states that a risk can be “obvious” even though it has a low probability of occurring.

catastrophic injuries.¹⁵ As such there is not a significant “risk” (emphasis on likelihood of occurrence) of harm resulting from this activity. As such, under the “significant risk” application the section is not enlivened and liability cannot be avoided. Alternatively, however, where the resultant harm from a collapsed scrum is catastrophic (emphasis on level of harm) a case can be made out under the “significant harm” application such that the section is enlivened and liability in negligence avoided.

This example shows quite clearly that the “significant risk” and the ‘significant harm’ constructions used by Ipp JA in fact create conflicting (and arguably unsustainably different) outcomes.

What of risk and harm “mutually informing each other”?

The leading sentence in paragraph 12, the quoted statement of Justice Ipp, is:

*“In substance, it seems to me, that the expression constitutes one concept with the risk and the harm mutually informing each other”.*¹⁶

Ipp JA is addressing “a significant risk of physical harm” when he refers to “the expression”.

The phrase “mutually informing each other” is not a legal term, and so, is discernible through its use as a common expression of language. Ipp JA sees “risk” and “harm” as “one concept”. When a word, or more correctly the denotation of a word, informs another word, one would expect that there is a flow of information from the original (informing) word to the subsequent (informed) word. Typically a word informs another because it is an adjective describing a noun, or an adverb describing a verb, for example, ‘tall’ in the phrase ‘a tall man wearing a rain coat’. A concept may inform another concept such as a man wearing a rain coat informs me, whilst I am indoors, that there is probably rain outside.

Under Justice Ipp’s formulation the “risk” informs the “harm” which informs the “risk”. From Justice Ipp’s wording it would seem that when the risk is high the harm is also high or when the harm is high the risk must also be high. But in a universal sense this is not practical – the level of risk may have nothing to do with

Carmody DJ et al “Spinal Cord Injuries in Australian Footballers 1997-2002” MJA Vol. 182 No. 11 6 June 2005. ‘Seven injuries occurred in RU (Rugby Union) scrummage, all but one of which were to front row forwards ... There have been no scrum injuries in RL (Rugby League) since 1996, when scrums stopped being contested, whereas there were nine such injuries in the period 1986-1996.’

¹⁶ at para 12

the level of harm, nor the level of harm with the level of risk. For example, the level of shark attack risk in SCUBA diving may be very small but if that risk materializes the physical harm may be great – here the level of harm does not inform the level of risk. In fact when Ipp JA refers to the “risk of physical harm” being not significant where the harm is great but the risk is slight the two words clearly do not “inform each other”.

As a tool of grammar or as a means of interpretation, there does not appear to be any equivalent concept in any other decided case. The difficulty in comprehending such an arrangement is that there is not necessarily any causal relationship between “risk” and “harm”. Certainly there are examples of harm increasing as risk increases, such as driving a racing car – as speed increases the level of potential harm also increases. But the variable factor, speed, informs both “risk” and “harm” – it is not the level of harm that informs the level of risk.

Again the reason the suggested construction is so difficult to apply with any certainty is because the end sought by such a construction is not readily available from the words used in the section. Where ‘mathematical brackets’ are placed around “risk of physical harm”, as in [significant (risk of physical harm)] the “significance” increases in value as either “risk” or “physical harm” increases, or both increase concurrently, or one increases more than the other. Of course this approach is essentially impractical.

Interestingly, on the separate issue of whether an obvious risk (as referred to in s5L) must also be a significant risk, Ipp JA uses the following example:

“Assume that (in cricket) at the time when the ball is ‘dead’, a careless fielder throws the ball and seriously injures a batsman who is not looking. The risk of this occurring is so low that it is arguably not a significant risk of physical harm. This means that the batsman was injured by the materialisation of a risk, the existence of which does not render cricket a dangerous recreational activity (which arguably it is).”¹⁷

In the example given by his Honour, the likely occurrence of serious injury to a batsman caused by a careless throw from a fielder, is one of low risk. Here Ipp JA is using “significant” as an adjective describing “risk” rather than to the entire phrase. That is, the “risk” is low. But in *Falvo v Australian Oztag Sports Association* his Honour said, in apparent contradiction to this statement:

¹⁷ at para 26

*“on this basis the ‘risk of physical harm’ may be ‘significant’ if the risk is low but the potential harm is catastrophic.”*¹⁸

His Honour seems to compound significant risk with physical harm in the first place but then says it is the ‘significant risk’ that converts the activity into one of being dangerous. This does not appear to be consistent with the ‘significant harm’ interpretation of s5K.

Tobias JA and Section 5K

Tobias JA, in defining a dangerous recreational activity, agrees with Ipp JA, stating:

*“It will thus be appreciated that I prefer the approach of Ipp JA that, for the purposes of the definition of “dangerous recreational activity” in s5K, the scope of the relevant activity must be determined by reference to the particular activities engaged in by the respondent at the relevant time being the period immediately prior to the respondent suffering the relevant harm as a consequence of the appellants negligence.”*¹⁹

Although Tobias JA considers the “circumstances” which were germane to a dangerous recreational activity in regards to the present case²⁰ his Honour does not undertake any detailed interpretive analysis of s5K in regard to “significant risk” and “physical harm” nor to the apparent capacity of these concepts to “inform each other” as per Justice Ipp’s methodology. In preferring “the approach of Ipp JA”, Tobias JA, appears therefore to accept the construction and application of Ipp JA.

Basten JA and Section 5K

Basten JA, the third member of the Court of Appeal in *Fallas v Mourlas*, appears to agree with the interpretation of Ipp JA when he states:

*“The natural meaning of this definition is that what must be significant is either the ‘risk’ or the ‘risk of physical harm’. In my view the preferable approach is to treat that which is to be assessed as a ‘risk of physical harm’²¹. That will import a consideration of the seriousness of the harm which might occur. Thus if, as in *Rogers v Whittaker* (discussed below) the harm is potentially*

¹⁸ quoted at para 12 in *Fallas v Mourlas*

¹⁹ at para 92

²⁰ See para 93 to 96

²¹ We argue that ‘significant’ ‘risk of physical harm’ is not a natural reading.

catastrophic, a very low level of risk may be treated as 'significant'. On the other hand, where the harm is not serious at all, the risk may not be considered significant until it reaches a much higher level. ..."²²

Hence Basten JA adopts a construction that concentrates on the risk of harm rather than the likelihood of the harm occurring, and as such aligns the application with what we call the 'significant harm' application of Ipp JA.

His Honour continues:

*"The real issue is the scope of the term 'significant risk'. On one view the concept of a 'significant risk' is similar to that of 'a material risk' used in other contexts in tort law."*²³

According to Basten JA there is some equivalence between "significant risk" and "material risk." As an apparent example illustrating this equivalence with "other contexts of tort law" Basten JA refers to *Rogers v Whittaker*:²⁴

"a risk is material if, in the circumstances of a particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it ..."

But, it may be argued, a "material risk," as used in *Rogers v Whittaker* is not necessarily a "significant risk." In *Rogers v Whittaker* the plaintiff, Mrs Whittaker, "attaches significance" (or should attach significance) to the "warning" because of the fear of being blinded, however, the risk of occurrence is not significant (it is unlikely to occur).

Attaching significance to a particular risk does not mean that the risk is significant in the sense that it is likely to occur. For example, if warned of going blind the patient in *Rogers v Whittaker* would attach significance to the warning. The risk is not significant but the potential consequences are. These are two different things. In *Rogers v Whittaker* the risk was small – about one in fourteen thousand. The consequence to the patient of the small risk materialising was serious, but this does not convert a small risk into a large risk – it merely means that a sensible person would be prepared to reconsider having an operation with such potential. Hence, the risk may be significant in the mind of the individual patient but nevertheless mathematically insignificant. In *Rogers v Whittaker* the risk was insignificant but

²² at para 131

²³ at para 132

²⁴ (1992)175 CLR 479 at 490

the harm was very significant. Significant harm does not convert a risk from being remote into being likely. Whether a definition arising from a case dealing with medical negligence is automatically transferable to a case such as *Fallas v Mourlas* is also of some doubt.

And this is the point: is the *Civil Liability Act* 2002 (NSW) really aimed at removing liability from a tortfeasor where the likelihood of harm is virtually non-existent but nonetheless where their negligence causes the injury?

Using “significant” as a descriptor to the level of injury makes any activity potentially dangerous. This would not appear to be the object of the section. For example, in the sport of badminton the chances of serious eye injury may be 200,000 to 1. Yet if someone’s negligence caused the injury, say by using a slippery grip causing the racquet to leave the hand and hit the opponent injuring the eye, the claim would be that, given the potential catastrophic consequences, the sport is “dangerous” and liability should not attach. The risk is virtually non-existent but the consequence significant. Additionally, it may also be argued that the risk that is significant to an individual like Mrs Whittaker, facing possible blindness (that is, significant based upon psychological factors like fear and trauma) is not the same as a significant risk in the objective sense of the likelihood of a risk materialising.

The ultimate position of Basten JA is that, in relying on the use of the word “significant” as being similar to “material risk” from *Rogers v Whittaker*, injuries occurring in low risk sports should remove liability the tortfeasor.

However, if the use of “significant” in *Rogers v Whittaker* does not transfer to a broader application under the Civil Liability Act then an application contrary to that of Basten JA and of critical importance can be proposed. Under this contrary application if a risk is small even though the potential harm catastrophic, then tortious liability will remain – as in the example of badminton. Hence, if Justice Basten’s formulation is correct then small risk/high consequence sports will, generally speaking, enliven the provision. If the formulation, resting as it does on the use of “significant”, in *Rogers v Whittaker*, were not correct then the possibility remains that participants of a low risk sport producing a serious injury may not be included for protection under the Act. Of course the position of Basten JA may stand independently of *Rogers v Whittaker*, as does that of Ipp JA.

The importance of the judgments of both Tobias JA and Basten JA is that they are in general agreement with those of Ipp JA in regards to the application of s5K

In Summary; is the Application of Ipp JA Sustainable?

According to Justice Ipp's interpretation of s5K, it would be possible for the negligent party to run two, possibly incompatible, arguments from the same fact situation; one argument dealing with the significance of the risk, and the other dealing with the significance of the injury (and perhaps arguing backwards to show that reality arose from potential in light of the resultant harm).

For several reasons, the "significant risk" and the "significant harm" applications should not be available as alternatives. In summary these reasons are:

Firstly, the availability of these two very different applications invites a considerable level of theoretical and practical uncertainty. For example, had Mourlas been shot in the head rather than the leg, should the judgment be different? The argument would run along these lines: There was a low risk of harm occurring given that Mourlas was within the cabin of the vehicle, however, the fact that he was wounded in the head with resultant catastrophic harm proves that the recreational activity in question must be considered to be a dangerous recreational activity. Given this approach the section is enlivened by the seriousness of the injury and the defence is made out. The logical difficulty is that the recreational activity the group was engaged in (segmented or not) remains constant but the availability of the defence is determined by the seriousness of the resultant injury. If this were the better application, the section should read simply as requiring a "serious injury" to activate the defence. In addition, under this form of application what is required to enliven the section is significant harm and clearly significant harm can result from recreational activities that are not outwardly dangerous.

Secondly, the construction favoured by Ipp JA does not conform to the natural and ordinary grammar of the section. The use of the word "significant" within the phrase, "significant risk of physical harm" as either describing "risk" *or* "physical harm" is of a fundamental and far-reaching import as regards liability under the Act. As mentioned, Justice Ipp considers that three possible applications are available from the wording in s5K; "a significant risk of physical harm". It may well be suggested that only the "significant risk" application provides a correct interpretation of the passage.

Within the passage the word "significant" is an adjective that describes or modifies the noun "risk". However, Ipp JA indicates that "significant" can apply not only to risk but to the entire phrase "risk of physical harm", or to "physical harm". That is, Ipp JA seems to take the view that "significant" may apply to the entire phrase – as if there were mathematical brackets around "risk of physical harm". As such the

word “significant” may be used to modify or describe the level of harm so that liability would not result where there is a “risk of significant physical harm” or to modify the word “harm” so that where there is ‘significant harm’ there will be no liability.

The “significant harm” application, however, does not allow for the words of the legislative passage to take on their grammatical and ordinary meaning. To illustrate, there is a great difference in meaning between these two phrases when it comes to assigning potential liability:

1. ‘a *significant risk of physical harm*’ and
2. ‘a *risk of significant physical harm*’.

It is not possible to make each clause take on the meaning of the other. The two are very different in meaning and application, as illustrated through the example earlier of the collapsing rugby scrum.

The natural meaning of the words within the provision is clear and arguably not amenable to the broader, “significant harm” application.

Some Consideration of Statutory Interpretation

Ipp JA argues that the “significant harm” application furthers the purpose or object of the Act as required under s33 of the *Interpretation Act 1987* (NSW).²⁵

Basten JA also argues that a “purposive approach” to interpretation justifies the “significant harm” application:

*“The natural reading of this definition is that what must be significant is either the “risk” or the ‘risk of physical harm’. I would not read the word ‘significant’ as requiring a particular level of physical harm. Nor adopting a purposive approach, is there any reason to suppose that the legislature sought to exclude liability for serious physical harm, but not for insignificant physical harm. In my view the preferable approach is to treat that which is to be assessed as a ‘risk of physical harm.’ That will import a consideration of the seriousness of the harm which might occur.”*²⁶

²⁵ see para 45, 46

²⁶ at para 131

Yet the purpose of the Act is also furthered by the ‘significant risk’ construction, thereby casting doubt on the alternate constructions.

The potential difficulty with the ‘significant harm’ application used by Ipp JA is that it does not accord with the natural and ordinary meaning of the words of the section. For the section to apply to catastrophic harm (where there is not a significant risk) requires the placement of the modifier ‘significant’ to be shifted to precede and describe ‘physical harm’ so that the relevant section would read:

“dangerous recreational activity means a recreational activity that involves a risk of ‘significant’ physical harm.”

Such a modification clearly alters the meaning of the section placing emphasis upon the level of harm as opposed to the level of risk.

In his discussion as to the purpose of the legislation, Ipp JA points out that many of the provisions of the Act are “modeled on the Recommendations of the Final Report by the Panel appointed by the Commonwealth and State Governments to review the law of negligence (Second Reading Speech, Hansard 23 October, 2002 at 5765).”²⁷ His Honour points out that Sections 5K and L are based on Recommendations 11 and 12 although they differ materially in some respects. His Honour does state, however, that the rationale of the sections is that “a plaintiff who engages in a dangerous recreational activity in circumstances where the risks are obvious is to be regarded as having assumed those risks (see paragraphs 4.20 to 4.24 of the Final Report).”

In *Newcastle City Council v GIO General Ltd*²⁸ McHugh J said:

“Extrinsic material cannot be used to construe a legislative provision unless the construction of the provision suggested by that material is one that is ‘reasonably open’. ... If the legislature uses language that covers one state of affairs, a court cannot legitimately construe words of the section in a tortured and unrealistic manner to cover another set of circumstances.”

The “significant harm” application would, we submit, be a ‘tortured’ use of the language of the provision.

Stephen J said in *Cooper Brooks (Wollongong) Pty Ltd v Federal Commissioner of Taxation*²⁹:

²⁷ at para 45

²⁸ (1997) CLR 85 at 113

“... if the literal meaning is to be departed from, it must be clear beyond question both that the literal meaning does not give effect to the intention of the legislature and that some departure from literal meaning will fulfill that intent.”

Importantly the words of s5K, as naturally read, do in fact give effect to the intention of Parliament.

Hence there are a number of interpretive difficulties in accepting the Ipp JA model:

- A construction based on the natural and ordinary meaning of the words does conform to the intent of parliament.
- The interpretation appears to find two different meanings from the one provision and as such it is arguable that two different approaches cannot apply where they are in conflict, irrespective of a search for purpose. That is, they are at some level mutually exclusive.
- The narrow “significant risk” application also furthers the purpose of the Act, in that it serves to limit liability.

Clearly the ordinary grammatical meaning furthers the intent of Parliament. That Justice Ipp’s construction provides a level of flexibility in application is not to the point when the application of the words used in their natural sense also furthers that intent – and does so without torturing the language.

The “Ipp Report”

It is instructive to look closely at the *Review of the Law of Negligence Final Report* (“the *Ipp Report*”) (referred to above), which was the report of the Panel of eminent persons appointed by the Australian and State Governments to enquire into the reform of the law of negligence.³⁰ That panel was chaired by Justice Ipp.

The NSW legislature relied heavily on the *Ipp Report* when enacting the relevant sections of the *Civil Liability Act, 2002*. The report recommended that providers of recreational services should not be liable for injury or death suffered by a voluntary

²⁹ (1981) 147 CLR 297 at 320

³⁰ 2 October, 2002 available at www.treasury.gov.au

participant in a recreational activity as the result of the materialisation of an obvious risk.³¹ A “recreational activity” was defined in the Report as one “which involves a ‘significant degree of physical risk’”³². It is interesting to note that whilst the NSW legislation defines a “dangerous recreational activity” as one which involves “a significant risk of physical harm”, the Ipp Report uses the words “significant degree of physical risk”.

This difference in wording is, arguably, material. It may well be that the interpretation of s5K favoured by Ipp JA is more appropriate to the form of words used in the *Report’s* definition of a recreational activity than to the wording of the NSW section 5K. The phrase used in the Report does place the words “physical” and “risk” together so that they may both be qualified by the words “significant degree of”.

Of course, Section 34 of the *Interpretation Act* 1987 (NSW) would allow the use of extrinsic materials such as the *Ipp Report* to assist in the interpretation of section 5K, though in the present case the court presumably found it unnecessary (except on the issue of the purpose of the legislation) because of the different form of words used. It is interesting that the Ipp Report offers no hint as to how the Panel would have interpreted the words “significant degree of physical risk”, in particular, whether they would have considered them as importing all the possibilities propounded in *Fallas v Mourlas*.

What is the Meaning of “Significant” in Section 5K?

We have given consideration to the *context* of “significant” within section 5K. We shall now consider the denotation or *meaning* of “significant” within the same section. Section 5K defines a dangerous recreational activity as one “that involves a ‘significant’ risk of physical harm”. To apply the section therefore requires that a value to be given to the word “significant”.

Justice Ipp makes several statements in his judgment in *Fallas v Mourlas* as to the meaning of the word “significant” in section 5K. His Honour says:

*“I think it is plain that it means more than trivial and does not import an undemanding” test of foreseeability as laid down in Wyong v Shirt... ”*³³

³¹ Recommendation 11 at p. 64 of the report.

³² Recommendation 12(b) at p. 65 of the Report.

³³ at para 14

Then his Honour states:

*“On the other hand, it seems to me, a ‘significant risk’ does not mean a risk that is likely to occur; that would assign to it too high a degree of probability.”*³⁴

His Honour continues:

*“In the present context, the word ‘significant’ – coloured or informed as it is by the elements of both risk (which it expressly qualifies) and physical harm (which is indivisibly part of the expression under consideration) – is not susceptible to more precise definition.”*³⁵

Finally his Honour concludes:

*“Thus I do not think it practicable or desirable to attempt to impose further definition on ‘significant’, other than saying that the term lays down a standard lying somewhere between a trivial risk and a risk likely to materialise. Where the particular standard lies between these two extremes cannot be prescribed by any rule of thumb. Each individual case will have to depend on its particular circumstances and by having regard to the ordinary meaning of the term.”*³⁶
(Emphasis added)

Justice Ipp apparently wishes to leave the question of significance of risk as open as possible:

*“the composite question is whether there is a significant risk of physical harm and that requires a value judgment dependant on the circumstances of each individual case.”*³⁷

Despite the advantages of flexibility, describing “significant” as “more than trivial” is an imprecise use of the word. “Significant” may be more than “trivial” in the sense that water boils at a temperature greater than 1 degree Celsius, but in reality, such an approach offers little by way of useful designation.

In addition the use of the “significant” in the passages cited above seems to be an inaccurate use of the word. In the Australian Concise Oxford English Dictionary,³⁸

³⁴ at para 16

³⁵ at para 17

³⁶ at para 18

³⁷ at para 23

in context, the word “significant” means “noteworthy or important”. It is further defined as “having a meaning, indicative, having an unstated or secret meaning”. The thesaurus³⁹ suggests, “consequential, important, meaningful, material, principal, great, paramount, major, chief, main, prime, vital, serious, considerable ...” as contextual alternatives to “significant”.

Hence it would seem the definition of these words given by Ipp JA is arguably open to question.

Tobias JA takes a more precise view of the meaning of “significant” in the context of s5K. He states that it means:

*“a risk which is not merely trivial but generally speaking, one which has a real chance of materializing.”*⁴⁰

His Honour, having considered Ipp JA’s view, states that:

*“I am conscious of the observations of Ipp JA in [at 18] of his judgment that ‘significant’ means a standard somewhere between a trivial risk and a risk likely to materialize. A real chance of the risk materializing lies somewhere between these two standards, although probably closer to the second than the first. ... I see no danger in adopting as no more than a general guide that the risk should have a real chance of materializing for it to qualify as significant.”*⁴¹

As such Tobias JA would see a “significant” risk as one which has “a real chance of materializing”, however, this also includes a continuum of risk beginning with any risk greater than the trivial.

Basten JA does not consider the denotation of “significant”, however, it is informative to consider his Honour’s view of when, exactly, the “risk of harm is significant”. As indicated earlier, Basten JA in considering the assessment of whether a risk is “significant” looks to the idea of a “material risk”, as used in *Rogers v Whittaker* for guidance. His Honour further notes that s5K requires an objective test as to significance of risk rather than one “dependent on the

³⁸ The Australian Concise Oxford English Dictionary 3rd Ed. Oxford University Press, Australia, 1999

³⁹ Word Finder – A Dictionary of Synonyms and Antonyms, Readers Digest, Sydney 1983.

⁴⁰ at para 90

⁴¹ at para 91

expectations of a person in a particular relationship with another”⁴². His Honour observes in relation to the particular circumstances of *Fallas v Mourlas*:

“Modern small arms are highly accurate and do not explode, so that the only significant risks may arise from cases of incompetent or careless handling.

If that assessment be correct, it does not follow that activities involving firearms will not fall within s5L; rather the risk would need to be assessed according to whether incompetence or carelessness on the part of the particular participants rises above the level of a fanciful suggestion and constitutes a ‘significant risk.’”⁴³

This suggests that part of the determination of the significance of risk, and therefore whether the activity is a “dangerous recreational activity”, will rest upon the capacities of the individuals involved in the activity. The suggestion would mean for example that when considering the dangers of front row play in a rugby game, the professionalism of the opponents or perhaps the capacity and knowledge of the referee will form part of the assessment undertaken by the player. Of course it is easy for an injured party (with the benefit of the proverbial 20/20 hindsight) to find competency wanting when they reflect upon the circumstances which applied immediately prior to their injury.

Basten JA considers three possible ways to determine and prove whether a risk of harm is significant:

- Assume *any* risk will be significant where the results of it eventuating are likely to be catastrophic or
- examine statistics regarding frequency of accidents occurring in a particular context or
- consider “the particular circumstances of the case and inquire whether the participants were competent and experienced users of fire arms, whether they were fresh or tired, sober or inebriated and whether they were otherwise known to be careful and responsible people.”⁴⁴

Basten JA states that the first approach would make hunting expeditions inherently dangerous because gunshot is potentially catastrophic. However, his Honour also

⁴² at para 136

⁴³ at para 142-143

⁴⁴ at para 144

recognises that this “would not reflect the statutory test” if that test were not “satisfied by a miniscule risk, even of very serious harm”.⁴⁵

The second test was not argued at the hearing and there was no statistical evidence provided as to the frequency of accidental shootings, although, Basten JA notes statistics indicating 18 deaths from accidental fire arm use in the 10 years to 2001. But this figure does not show deaths from hunting or the types of injuries inflicted. His Honour goes on to note⁴⁶ that Callinan J, in *Woods v Multi-Sport*⁴⁷ referred to statistics concerning the incidence of injuries though he thought the statistics threw no light upon the incidence of the particular injury being considered in that case. McHugh J in the same case considered it appropriate to refer to statistics as “legislative” facts which a court might use to define the scope or validity of a principle of law.⁴⁸

As to the third method of determining significance of risk, Basten JA held that the defendant did not present sufficient evidence as to the specific circumstances of the case to enable the court to infer that there was a significant risk of injury.

The Scope of Recreational Activity

Obviously, the generality or particularity of a description of a recreational activity will have a marked influence on whether the activity can be said to be dangerous or not. The approach of the Court in *Fallas v Mourlas* on this issue was fairly uniform and was one which adopted a low level of abstraction when viewing the activity engaged in by the plaintiff.

Ipp JA took the view that:

*“the dangerousness (in terms of s5L) of the recreational activity is to be determined by the activities engaged in by the plaintiff at the relevant time. All relevant circumstances that may bear on whether those activities were dangerous in the defined sense include relevant matters personal to the plaintiff and others of the kind I have mentioned.”*⁴⁹ (emphasis added).

⁴⁵ at para 142

⁴⁶ at para 161

⁴⁷ (2002) 208 CLR 460 at para 168

⁴⁸ (2002) 208 CLR 460 at para 63

⁴⁹ at para 50

Ipp JA uses the example of ‘walking’ as a recreational activity to illustrate his view:

“... it is not possible in my view to provide a bright line description somewhere between the everyday general description of a recreational activity and the ‘particular activities engaged in by the plaintiff at the relevant time’. For example, if it is accepted that ‘walking’ is too general a description, where does one draw the line between that general description and a description that would allow one or more of the following factors to be taken into account: the place of the walk, the state of the traffic anticipated and experienced, the condition of the path, the actual weather, the weather that was expected, the visibility, the age of the walker, the mental competence of the walker, the walkers experience, the walkers sobriety, the walkers clothing ... whether the walker was alone or with companions, the age competence, experience and sobriety of the companions. The list of factors that could bear upon the risk involved in this simple common or garden recreational activity is infinite in number. How can one differentiate in a principled way between them? In my opinion, this question cannot be answered in a satisfactory way. All must be taken into account.”⁵⁰

Tobias JA recognised that:

“for the purposes of the definition of ‘dangerous recreational activity’ in s5K the scope of the relevant activity must be determined by reference to the particular activities engaged in by the respondent at the relevant time...

*(I)n determining whether the relevant recreational activity involves a significant risk of physical harm, one must identify that activity at a relatively detailed level of abstraction by including not only the particular conduct actually engaged in by the respondent but also the circumstances which provide the context in which that conduct occurs”.*⁵¹

His Honour then looked at the specific circumstances of the activity in the instant case at a particularly detailed level. Ultimately Tobias JA concluded that all the circumstances of the activity in that case, made of it, a dangerous recreational activity, as did Ipp JA.

⁵⁰ at para 47-48

⁵¹ at para 92

Segmenting the Recreational Activity

It is notable that Ipp JA recognises that a given recreational activity may be made up of various distinguishable and separate parts, so that for the purpose of determining whether activity is dangerous or not, may necessitate it being divided into its component parts with each part considered separately on the issue of dangerousness. His Honour states:

*“segmenting...would reasonably be possible where persons are engaged in a recreational activity that comprises sets of activities that, according to commonsense considerations, are distinguishable and separate from each other.”*⁵²

Certainly segmenting the recreational activity into its component parts seems an essential and common sense approach to take in light of the realities of most sports or recreations. For example, a golfer negligently injured by a wayward ball whilst waiting to tee-off on the first hole or whilst refreshing at the half-way house, may be an entirely different proposition to a golfer being injured whilst standing on the fairway. Indeed, section 5L seems to mandate segmenting those risks which are obvious from those which are not when considering “the materialisation of an obvious risk of a dangerous recreational activity”.

However, the practical difficulty in segmenting recreational activities into their component parts is the vast number of possible permutations that could, potentially, come into argument and judicial consideration. Ipp JA in his appraisal of the common activity of walking mentions just a few. However, when the level of complexity of the activity in question increases then arguably the list of variables to be taken into account will also, very often, increase. This will be particularly evident in body contact sports, or semi-contact sports, where the number of possible segmentations, based on the nature of the game, the individual contests within the game, the level of expertise of players and referees, other human factors, the stage of the game and resultant tiredness, would at times appear almost incalculable. The task would seem to be almost unmanageable where the various segmented parts combine in synergy or militate against each other.

⁵² at para 46

What is an Obvious Risk?

The defence in s5L does not operate unless the plaintiff is injured by an obvious risk of a “dangerous recreational activity”. Section 5F(1) defines an obvious risk as one “that in the circumstances would have been obvious to a reasonable person in the position” of the harmed person. It includes risks that are “patent” or “matter(s) of common knowledge”. Such a risk can be one that has a “low probability of occurring” and need “not (be) prominent, conspicuous or physically observable”.

All three Justices in *Fallas v Mourlas* agree that the definition of “obvious risk” requires the court to have regard to all the circumstances of the plaintiff’s injury to determine whether the risk would have been obvious to a reasonable person in the position of the plaintiff, however, there is a disagreement between Ipp JA and Basten JA as to the application of “obvious risk”.

Ipp JA considers that there is a difference between the type of “risk” referred to in s5K and described by the word “significant”) and the type of risk referred to in s5F(1). His Honour states:

*“A significant risk that converts a recreational activity into a dangerous recreational activity may be entirely different risk from the risk that materialises.”*⁵³

...

*Basten JA has expressed the opinion that “for s.5L to be engaged, at least one of those [significant] risks must materialise [as an obvious risk] and result in harm suffered by the plaintiff.” I respectfully disagree. In my view there is nothing in s.5L that indicates that the obvious risk that materialises must be one of the significant risks that transforms a recreational activity into a dangerous recreational activity.”*⁵⁴

As Ipp JA indicated above, Basten JA takes the view that for the s5L defence to be available, the obvious risk which injures the plaintiff must also be one of the “significant” risks which renders the recreational activity in which the plaintiff is engaged, dangerous.

This difference of view between Ipp JA and Basten JA is left unresolved in *Fallas v Mourlas* with Tobias JA taking a somewhat different approach and not

⁵³ at para 25

⁵⁴ at para 29

specifically addressing the issue. The issue has not been resolved in subsequent decisions on section 5L. (discussed below)

Tobias JA notes that the word “obvious” is not defined in the Act. He refers to the definition he used in *Wyang Shire Council v Vairy; Mulligan v Coffs Harbour City Council*:⁵⁵

“‘Obvious’ means that both the condition and the risk are apparent to and would be recognised by a reasonable man, in the position of the [plaintiff] exercising ordinary perception, intelligence and judgment.”

A matter in regards to s5L worth some brief consideration is how the question of when, as a matter of ‘fact,’ an “obvious risk” is to be part “of” a “dangerous recreational activity”. Note that s5L cannot apply unless the harm materialises from an obvious risk “of” a dangerous recreational activity. If the “risk” is not part “of” the recreational activity in question then there can be no relief for a defendant under the section.

When Basten JA deals with the fact issue of night shooting, as opposed to day shooting, his Honour inadvertently reveals an example of how an assumed state of fact may create specific difficulties in the application s5L. His Honour states:

*“The risk of discharge of a firearm, causing harm to a person, is far more likely to occur during a hunting accident at night.”*⁵⁶

What may appear to be a common sense assessment of the likelihood of a risk eventuating may in fact be far from true. For example, could it be said that the likelihood of risk is in fact lower in spotlighting shooting because the shooters aim at an illuminated target from a generally central position, rather than say, spreading out? What is to be taken under judicial notice and what is not, again, will be a matter of some debate in the context of s5L.

Other Cases on Section 5 K & L Civil Liability Act 2002 (NSW).

Fallas v Mourlas and *Falvo v Oztag* which is referred by Ipp J in his judgment in *Fallas v Mourlas*, have not been the only decisions of the Supreme Court of New South Wales on the application of sections 5K and L of the *Civil Liability Act 2000* (NSW), though they are the most influential in so far as they specifically address

⁵⁵ [2004] NSWCA 247 at 168

⁵⁶ at para 164.

the issue of what constitutes a “significant risk of physical harm” for the purpose of determining whether an activity is a “dangerous recreational activity” under s5L.

Before the judgment in *Fallas v Mourlas* (delivered on 16 March, 2006), the Supreme Court of New South Wales had delivered judgment in *Edwards v Consolidated Broken Hill Ltd*⁵⁷ (on 11 April, 2005) and the New South Wales Court of Appeal had delivered judgment in *Doubleday v Kelly*⁵⁸ (on 12 May, 2005). In each of these cases section 5L was relied upon by way of defence and in each case the defence failed because the risk which eventuated was held not to have been obvious to the reasonable person in the position of the plaintiff. There was no ruling from the court in either case on the interpretation of the “dangerous recreational activity” definition in s5K and the words “significant risk of physical harm”.

In *Edwards v Consolidated Broken Hill Ltd*, Grove J considered whether the defendant could rely on the s5L defence in respect of a plaintiff who was injured when he was riding a bicycle across an unfenced and disused railway bridge from which he fell some distance to the ground below. The bridge was occupied by the defendant who allowed rail cars to be “parked” along the bridge, so making the passageway very narrow. His Honour considered that “the riding of a bicycle scarcely fits the concept of what I would understand the legislature to have intended to have comprehended in its expression ‘dangerous recreational activity’”⁵⁹ Grove J found that the risk in that case “of falling from the bridge because the space for passage had been limited by the presence of rail cars is not a risk of bicycle riding as such, rather it is a risk created by the defendant’s activity.”⁶⁰ His Honour did not offer any analysis or interpretation of the wording of s5K and he ignored the “significant risk of physical harm” requirement for a recreational activity to be characterized as “dangerous”, even though he concluded that the activity engaged in by the plaintiff was not a dangerous one.

The New South Wales Court of Appeal rejected the s5L defence in *Doubleday v Kelly* where the plaintiff who was 7 years old and a guest of the defendants, was injured whilst unsupervised and wearing roller skates on a trampoline. The court found it unnecessary to consider the issue of whether the plaintiff’s actions constituted a “dangerous recreational activity” under s5K because there was no doubt that the risk of injury was not obvious, under s5F(1), to a child of 7 years of

⁵⁷ [2005] NSWSC 301

⁵⁸ [2005] NSWCA 151

⁵⁹ at para 24

⁶⁰ at 24

age in the position of the plaintiff. The court took the view, that the age of the plaintiff was a relevant consideration on whether the risk of injury would be obvious to a reasonable person in the position of the plaintiff, pursuant to s5F. This was of course, the case at common law (on the issue of reasonable foreseeability) prior to the enactment of the *Civil Liability Act 2002* (NSW)⁶¹

Some weeks subsequent to the decision in *Fallas v Mourlas*, the New South Wales Supreme Court considered the s5L defence in *Smith v Perese & Ors*⁶² (on 21 April, 2006). The New South Wales Court of Appeal then considered the section in *Lormine Pty Ltd & Anor v Xuereb*⁶³ on 25 July 2006 and again on 5 October, 2006 in *Great Lakes Shire Council v Dederer & Anor*⁶⁴.

In *Smith v Perese* the plaintiff was injured when run over by a motor boat, driven by the first defendant, whilst spear-fishing at a well known fishing spot on the south coast of New South Wales. Studdert J did not refer to the judgments in *Fallas v Mourlas*. His Honour found that the plaintiff was not engaged in a dangerous recreational activity within s5 K of the Act. His Honour took the view, as did the court in *Fallas v Mourlas* that all of the circumstances in which an activity is undertaken must be considered in order to assess whether the activity is dangerous. His Honour was not satisfied that the activity in which the plaintiff was engaged involved a significant risk of physical harm.

His Honour stated:

*“In determining whether a recreational activity is dangerous, that really depends upon an assessment of all the circumstances in which that activity is undertaken. It does not seem to me that one could decide that that to go spear fishing was always a dangerous recreational activity or that it was never a dangerous activity....The need is to assess the particular circumstances in which the activity was being undertaken.”*⁶⁵

Studdert J did not canvass the issue of whether the word “significant” in s5K should be read as qualifying both the words “risk” and “harm” as Ipp JA had done in *Fallas v Mourlas*.

⁶¹ *McHale v Watson* (1964) 111 CLR 384).

⁶² [2006] NSWSC 288

⁶³ [2006] NSWCA 200

⁶⁴ [2006] NSWCA 101

⁶⁵ at Para 86.

His Honour further concluded in *Smith v Perese* that the risk which materialised and injured the plaintiff was not “obvious” within s5G. Justice Studdert referred to the judgment of Dunford J at first instance in *Dederer v RTA & Anor*⁶⁶, to the effect that the risk of harm, that is, the injury resulting from the danger, not the danger itself, must be obvious to a reasonable person in the position of the plaintiff. Studdert J concluded that in all the circumstances of Mr. Smith’s spear fishing, the risk of injury was not obvious.

In *Lormine Pty Ltd & Anor v Xuereb*⁶⁷ the plaintiff sued in respect of injuries received when she was a paying passenger aboard the defendant’s boat on a dolphin watching cruise. The plaintiff, who had been invited to sit at the bow of the vessel, was swept heavily toward the stern when the boat was hit by a very large wave. She suffered severe injury. The incident was held to be the result of the negligence of the captain of the vessel. The defendants sought to rely on s5L of the *Civil Liability Act* to avoid liability.

The leading judgment in the New South Wales Court of Appeal was delivered by Mason P with whom McColl JA and Hunt AJA agreed. Justice Mason referred to *Falvo v Oztag* and *Fallas v Mourlas* on the issue of whether the activity in which the plaintiff was engaged was a dangerous recreational activity. He stated that the question is to be determined:

“... objectively and prospectively. The standard lies somewhere between a trivial risk and one that is likely to occur. Significance is to be informed by the elements of both risk and physical harm. The characterization must take place in the particular context...”⁶⁸

His Honour held that the statutory defence was not available in the circumstances of the plaintiff’s injury. It is notable however that Mason P adopted the view of Ipp JA in *Fallas v Mourlas* that the word “significant” within s5K is “informed by the elements of both risk and physical harm” though he does not consider the issue in any detail.

The defence provided by s5L of the *Civil Liability Act 2002* (NSW) was successful in the New South Wales Court of Appeal, for the first time since the commencement of the Act, in *Great Lakes Shire Council v Dederer & Anor*.

⁶⁶ [2005] NSWSC 185

⁶⁷ [2006] NSWCA 200

⁶⁸ at para 31

The plaintiff, Phillip James Dederer, dived off the Foster/Tuncurry Bridge into the tidal river estuary some 9 metres below on 31 December 1998. He was then aged 14 years and 6 months. He struck his head on the bottom of the river and became paraplegic. The evidence established that it was well known to the local council (and the RTA) that the bridge was a very popular spot for young people to jump and sometimes to dive, into the river. The bridge railings were designed and constructed in such a way as to make climbing onto the top of the railing and jumping into the river an easy thing to do.

There were “pictograph” signs at each end of the bridge, prohibiting diving, as well as written signs prohibiting climbing on the bridge. The plaintiff had seen the signs but ignored them. Evidence at trial established that it was impossible to enforce the prohibition on climbing on and jumping off the bridge. The plaintiff had twice jumped off the bridge into the river the day before his accident and he had, over many years often seen other people jump or dive off the bridge. The evidence was that in the 40 years since the bridge was built, until the plaintiff’s injury, no known injury had occurred as a result of a person jumping or diving off the bridge.

The Court of Appeal held unanimously that the activity the plaintiff was engaged in (i.e. diving from the bridge) was a “dangerous recreational activity” within the definition in s5K of the *Civil Liability Act*. The appeal justices (Handley, Ipp and Tobias JJA) did not however, consider the wording of the definition. In particular they did not address the issue of whether, in the phrase “a significant risk of physical harm”, the word “significant” qualifies both the risk and the harm. Justice Ipp’s interpretation of these words in *Fallas v Mourlas* was not canvassed.

In view of all the evidence in the *Dederer* case suggesting that there was no recorded injury to a person diving off the bridge in the 40 years prior to Mr. Dederer’s accident, it is curious that the Court of Appeal did not look more closely at the issue of whether there was a “significant risk of physical harm” given that the risk was apparently, on the evidence, fairly unlikely to materialise, even though the potential harm was catastrophic.

The Court of Appeal concluded that the risk to the plaintiff was obvious “to a reasonable person in the position of that person”, even allowing for the fact that the plaintiff was fourteen and a half years old and relatively immature at the time of his accident.

Several matters persuaded the Court of Appeal that the risk would have been obvious to a person in the position of the plaintiff. They were:

- That the plaintiff conceded in evidence that he knew the sand bar moved with the current and that water depths were hard to judge. Ipp JA recognized that the issue of obviousness of risk is not to be determined subjectively, but noted that the plaintiff's state of mind gives an indication of what a reasonable person, in the position of the plaintiff, would know of the risk.⁶⁹
- That the plaintiff saw and understood the "pictograph" sign prohibiting diving.
- That the plaintiff dived from a height of some 9 metres, some distance away from a visible sandbar, into water of unknown depth.

Taking all these factors into account, the court concluded that "it should have been obvious to a reasonable fourteen and a half year old that such a dive was dangerous and could lead to catastrophic injuries".⁷⁰

Ipp JA further found that the trial judge's findings on the one hand, that the risk was not obvious and on the other hand, that the plaintiff was guilty of contributory negligence, were inconsistent. Ipp JA further found that the trial judge had erred because he "decided the question of obviousness of risk by reference to what Mr. Dederer subjectively knew and not by reference to a reasonable person in his position as s5G requires".⁷¹

It is interesting that on the facts, the Court of Appeal adopted an opposite view of the reasonable foresight of a young teenage boy to that of the trial judge, effectively attributing quite a high degree of common sense to a fourteen and a half year old boy.

So, the Council was afforded a complete defence to the plaintiff's claim by s5L of the *Civil Liability Act 2002* (NSW).

Conclusion

The striking feature of all these cases on s5L is that on only one occasion so far, has the defence succeeded in the Supreme Court or the Court of Appeal in New South Wales. The twin requirements that the activity in which the plaintiff is engaged must be dangerous, involving a significant risk or physical harm and that

⁶⁹ at para 164.

⁷⁰ at para 172 per Ipp JA

⁷¹ at para 159.

the risk which materialises must be objectively obvious ensure that the defence is not readily available.

The judgments in *Fallas v Mourlas* and the cases referred to above illustrate the difficulties associated with the interpretation of s5L of the *Civil Liability Act*, in particular the uncertainty surrounding the definition of “dangerous recreational activity” in s5K. There is no real resolution of how the words “significant risk of physical harm” are to be interpreted and until that definition is clarified either by further appellate consideration or re-drafting by parliament, what recreational activities are dangerous will remain at best, uncertain, at worst, a mystery.