LIABILITY FOR PERSONAL INJURY ARISING FROM THE SUPPLY OF RECREATIONAL SERVICES

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This article discusses the liability of suppliers of recreational services for personal injury sustained by participants in recreational activities in the context of changes to the Trade Practices Act 1974 (Cth.) and the various state Civil Liability regimes.[1]

There are, broadly speaking, four categories of statutory provisions that have been introduced by some, but not all, of the jurisdictions around Australia that address the liability of providers of recreational services:

- provisions in the *Trade Practices Act* and various of the *Fair Trading Acts* allowing for a contract for the supply of recreational services to exclude what would otherwise be a non-excludable implied warranty that services will be rendered with due care and skill;
- civil liability legislation dealing with 'obvious risks' generally, and not limited to risks of recreational services;
- civil liability legislation dealing with the materialisation of obvious risks of dangerous recreational activities;
- civil liability legislation excluding liability where a 'risk warning' is given.

As the focus of this article is the provision of recreational services, it is necessary to understand what is meant by that term in the various statutory regimes.

What are recreational services?

One of the difficulties in analysing and comparing the various statutory regimes is that they use different definitions of 'recreational services' or 'recreational activity', and a recreational pursuit may fall within one and not another.[2]

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1 This is a reference to the legislation enacted by each of the states and territories in response to the so-called 'insurance crisis'. The main legislative provisions are contained in: *Civil Law (Wrongs) Act* 2002 (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liabilities and Damages) Act* 2003 (NT); *Civil Liability Act 2003* (Qld); *Civil Liability Act* 1936 (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic).

2 See *Stephanie Young v Insight Vacations Pty Limited* [2009] NSWDC 122 at [40].

For the purposes of the *Trade Practices Act*: [3]

> **recreational services** means 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 purposes of recreation, enjoyment or leisure.

The Victorian,[4] South Australian[5] and Northern Territory[6] legislation adopts the same definition of 'recreational services' as the *Trade Practices Act*.

The Queensland *Civil Liability Act* definition of 'dangerous recreational activity' means 'an activity engaged in for enjoyment, relaxation or leisure that involves a significant degree of risk of physical harm to a person'.[7]

The New South Wales *Civil Liability Act* defines 'recreational activity' to *include*:[8]

> (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, 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 or any pursuit or activity for enjoyment, relaxation or leisure.[9]

This is a very broad definition of recreational activity, and is apt to encompass a great deal of non-sporting activity such as playing cards, chess, walking, sex, prayer and consuming alcohol.

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[3] Section 68B, *Trade Practices Act 1974* (Cth).
[4] Section 32N, *Fair Trading Act 1999* (Vic).
[5] Section 74H, *Fair Trading Act 1987* (SA). As at the date of submission of this article for publication, the amendments to the *Fair Trading Act 1987* (SA) made by the *Statutes Amendment and Repeal (Fair Trading) Act 2009* had not commenced.
[6] Section 68A, *Consumer Affairs and Fair Trading Act* (NT).
[7] Section 18, *Civil Liability Act 2003* (Qld).
[8] In other words, in contrast to the Commonwealth definition, the NSW definition is inclusive and not exhaustive.
[9] Section 5K, *Civil Liability Act 2002* (NSW).

In *Belna Pty Ltd v Irwin*[10] the New South Wales Court of Appeal rejected a submission that a plaintiff undertaking an exercise program in order to lose weight and to get fit was not engaged in a recreational activity. Ipp JA noted the Oxford English Dictionary meaning of 'sport' as 'participation in activities involving physical exertion and skill' and considered the exercise program fell within that meaning of 'sport'.[11] His Honour also noted that the plaintiff:

> stated in the questionnaire that her short-term goal in undertaking the activities was to 'enjoy life' . She stated that her long-term goal was to lose weight and become fit, but this does not detract from the fact that she undertook the activities for enjoyment, relaxation and leisure. The loss of weight and achievement of physical fitness was only a by-product of the exercises that she intended to perform. By analogy, a person who runs marathons in the heat of summer does so for enjoyment, relaxation and leisure, even though she may hope to lose weight in the process.[12]

In addition, the exercises were being performed at a place 'where people ordinarily engage in sport or … [a] pursuit or activity for enjoyment, relaxation or leisure', the general meaning of those words not being limited by the reference to 'a beach, park or other public open space.'[13]

Other examples of 'recreational activity' appearing in the cases include: a 19 year old boy diving from a wharf;[14] participation in a dolphin watch cruise;[15] spearfishing;[16] kangaroo shooting;[17] playing Oztag;[18] and trailriding.[19]

Western Australia[20] has adopted the identical definition to New South Wales and Tasmania[21] has adopted paragraphs (a) and (b), but not (c) of the New South Wales definition.

Supply of services implied warranty: Trade Practices Act

The main provision of the *Trade Practices Act* that impacts upon the recovery of damages for personal injury sustained by participants in recreational activities is section 74, which applies where there is a contract for the supply by a corporation

[10] *Belna Pty Ltd v Irwin* [2009] NSWCA 46.
[11] Ibid at [13].
[12] *Belna Pty Ltd v Irwin* [2009] NSWCA 46 at [14].
[13] Ibid at [16].
[14] *Jaber v Rockdale City Council* 2008] NSWCA 98.
[15] *Lormine Pty Ltd v Xuereb* [2006] NSWCA 200.
[16] *Smith v Perese* [2006] NSWSC 288.
[17] *Fallas v Mourlas* (2005) 65 NSWLR 41.
[18] *Falvo v Australian Oztag Sports Association* [2006] NSWCA 17.
[19] *Mikronis v Adams* (2004) 1 DCLR (NSW) 369.
[20] Section 5E, *Civil Liability Act 2002* (WA).
[21] Section 19, *Civil Liability Act 2002* (Tas).

of services including, relevantly, recreational services, to a consumer.[22] In every such contract there is an implied warranty that the services will be rendered with due care and skill and that any material supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied.

This implied warranty only becomes relevant where there is a contract for the supply of services. Further, the remedy for breach of the implied warranty is an action for breach of contract.[23] Because of the requirement of privity of contract, the availability of damages for breach of the implied warranty will be restricted to those participants who are parties to the contract.

The operation of section 74 has been restricted by virtue of amendments made to the *Trade Practices Act* in 2002[24] and 2004[25] as part of the Commonwealth Government's response to the Ipp Report.

Prior to 2002, section 68 rendered void any provision of a contract that purported to exclude, restrict or modify any liability of a corporation for breach of the warranty implied by section 74. In 2002, however, section 68B was inserted. It effectively provides that a provision of a contract can exclude, modify or restrict the liability of a corporation under the warranty implied by section 74 if the contract is for the supply of 'recreational services', is limited to liability for death or personal injury, and the contract was entered into after the commencement of the section.

In 2004, section 74 was amended by the insertion of subsection (2A). Previously, it had been held that section 74 carried with it full contractual liability for breach and that to the extent a provision of a State or Territory law purported to limit that liability, there was a conflict between the provisions amounting to a direct inconsistency, with the State or Territory laws therefore being invalid.[26] The aim of subsection 74(2A) is to overcome this inconsistency, and to apply State or Territory laws that limit or preclude liability for breach of contract to a breach of the implied warranty. That subsection provides as follows:

> If:
>
> (a) there is a breach of an implied warranty that exists because of this section in a contract made after the commencement of this subsection; and

[22] 'Consumer' is defined by section 4B of the Act.
[23] *Malo v South Sydney District Junior Rugby Football League* [2008] NSWSC 552 applying *Arturi v Zupps Motors Pty Ltd* (1980) 49 FLR 283.
[24] The relevant amendment was made by the *Trade Practices Amendment (Liability for Recreational Services) Act 2002* which inserted section 68B.
[25] The relevant amendment was made by the *Treasury Legislation Amendment (Professional Standards) Act 2004* which inserted section 74(2A).
[26] *Wallis v Downard-Pickford (North Qld) Pty Ltd* (1994) 179 CLR 388.

(b) the law of a State or Territory is the proper law of the contract;

the law of the State or Territory applies to limit or preclude liability for the breach, and recovery of that liability (if any), in the same was as it applies to limit or preclude liability, and recovery of a liability, for breach of another term of the contract.

Assuming the wording is effective to achieve this aim, then State or Territory laws precluding liability,[27] or restricting the recovery of damages,[28] will apply in relation to a claim for breach of the warranty implied by section 74.

However, there is considerable doubt whether the Commonwealth Parliament has effectively achieved this aim. This aspect of the *Trade Practices Act* will be addressed in more detail below once the State and Territory provisions have been described.

Supply of services: State and Territory Fair Trading Acts

The *Fair Trading Acts* in New South Wales,[29] Victoria,[30] Western Australia[31] and the Northern Territory[32] include a provision equivalent to section 74 of the *Trade Practices Act*. Proposed amendments to the *Fair Trading Act* in South Australia will also introduce an equivalent provision in that state.[33] The main difference between the *Trade Practices Act* and the *Fair Trading Acts* is that the latter are not limited in their application to corporations, but apply to a contract for the supply of services by any person.

However, the States and Territories have taken different approaches to the circumstances in which liability for harm resulting from breach of the warranty may be excluded, restricted or modified in a contract for the supply of recreational services.

New South Wales

In New South Wales section 40M of the *Fair Trading Act*, which provides the usual non-excludability of the implied warranty, is expressly subject to section 5N of the

[27] For example, Part 1A, Division 5 of the *Civil Liability Act 2002* (NSW) which limits the liability in negligence (ie for a failure to exercise due care and skill, whether the cause of action is pleaded in tort or in contract) for injury resulting from participation in a recreational activity.
[28] For example, Part 2 of the *Civil Liability Act 2002* (NSW) which limits the recovery of personal injury damages.
[29] Section 40S, *Fair Trading Act 1987* (NSW).
[30] Section 32J, *Fair Trading Act 1999* (Vic).
[31] Section 40, *Fair Trading Act 1987* (WA).
[32] Section 66, *Consumer Affairs and Fair Trading Act* (NT).
[33] Amendments proposed by the *Statutes Amendment and Repeal (Fair Trading) Bill 2008.*

Civil Liability Act. Section 5N provides that despite any other written or unwritten law, a term of a contract for the supply of recreation services may exclude, restrict or modify any liability in negligence for harm resulting from a recreational activity that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill. It further provides that a term of a contract for the supply of recreation services to the effect that a person to whom recreation services are supplied under the contract engages in any recreational activity concerned at their own risk operates to exclude any such liability.

Curiously, given the otherwise draconian nature of the New South Wales provisions relating to assumption of risk and recreational activities, section 5N of the *Civil Liability Act* does not apply if it is established that the harm concerned resulted from a contravention of a provision of a written law of the State or Commonwealth that establishes specific practices or procedures for the protection of personal safety. In such a case, any attempt to exclude or modify the operation of section 40S of the *Fair Trading Act* will be ineffective.

Potentially, this is a significant restriction on the ability to contract out of the implied warranty under section 40S of the *Fair Trading Act*. At a general level, the effect of sections 8 and 10 of the *Occupational Health and Safety Act 2000* is that the operators of a recreational facility have a duty to ensure the safety of their employees and other people at the facility. The operator must ensure that participants and others are not exposed to risks arising from the activities undertaken at the facility. Moreover, the operators have duties in their capacity as controllers of the premises to ensure that the premises are safe and without risks to health. Chapter 4 of the *Occupational Health and Safety Regulation 2001* prescribes more specific obligations in relation to matters such as the condition of premises and electrical installations. Arguably these provisions establish specific practices or procedures for the protection of personal safety within the meaning of section 5N, so that a failure to adhere to these provisions will disentitle the operator from relying upon section 5N of the *Civil Liability Act* to exclude, restrict or modify the implied warranty under section 40S of the *Fair Trading Act.* More directly, legislation and statutory instruments governing specific recreational activities, for example the use of pyrotechnics and firearms (including paintball), may limit the application of contractual attempts to exclude restrict or modify liability under section 40S of the *Fair Trading Act*.

South Australia

Until recently, the *Recreational Services (Limitation of Liability) Act 2002* provided a detailed regime for the approval and registration of codes of practice governing the provision of recreational services, setting out the measures that a provider of recreational services should take in order to ensure a reasonable level of protection for consumers. Recreational service providers could also seek

registration under the Act, such registration recording the code or codes governing the recreational services to be provided by the registered provider. Section 6 then allowed a registered provider to enter into a contract with a consumer modifying the duty of care owed by the provider to the consumer, so that the duty of care was then governed by the registered code. The duty of care could similarly be modified in accordance with a registered code where the recreational services were provided gratuitously. The *Recreational Services (Limitation of Liability) Regulations* imposed notice requirements. In either case, the registered provider was only liable in damages if the consumer could establish that a failure to comply with the registered code caused or contributed to the injury.

On 23 July 2009 the *Statutes Amendment and Repeal (Fair Trading) Act 2009* was assented to, although, as at the date of submission of this article for publication, the provisions relevant to recreational services had not yet commenced. When they do, they will repeal the *Recreational Services (Limitation of Liability) Act 2002*. They will also amend the *Fair Trading Act 1987* (SA) in the following ways:

- section 74G will be inserted to provide for an implied warranty in similar terms to section 74 of the *Trade Practices Act*;
- section 74H(1) will allow a term of a contract for the supply of recreational services to a consumer[34] to exclude, restrict or modify a warranty implied in the contract by section 74G;[35]
- such a term must meet certain requirements, including that it contain certain prescribed particulars and be in a prescribed form;[36] that it is brought to the attention of the consumer prior to the supply of the services; that the consumer has agreed to it in the prescribed manner; and that a statement containing any other information prescribed by the regulations be made available to the consumer in accordance with the requirements of the regulation;
- section 74H(1) will not operate to allow liability under the implied warranty to be excluded, modified or restricted where the reckless conduct of the supplier causes significant personal injury;[37]

[34] A 'consumer' is a person who acquires, or proposes to acquire, goods or services, and for the purposes of the provisions under discussion, will includes a person who acquires goods or services for the purposes of a business.

[35] It also purports to authorise an exclusion, restriction or modification of the warranty implied by section 74 of the *Trade Practices Act*. However, while it is doubtful this aspect of the provision is effective, the same result may be arrived at by the operation of section 74(2A) of the *Trade Practices Act*.

[36] The expectation is that the regulations to be made under the new regime in South Australia will reflect the content of the Victorian Regulations, discussed below.

[37] Section 74H(3), *Fair Trading Act 1987* (SA). 'Reckless conduct' is defined to mean conduct where the person is aware (or ought be aware) of a significant risk that the conduct could result in personal injury, and the person engages in the conduct despite the risk and without 'adequate justification'. This last phrase appears to be an invention of the South Australian Parliament and would appear to have no accepted or widely – understood meaning.

- a term of a contract will be void if it purports to indemnify or has the effect of indemnifying a person who supplies recreational services in relation to any liability that may not be excluded restricted or modified under the Act *or any other Act or law*.[38] This of course does not apply to contracts of insurance.[39]

Victoria

In Victoria section 32N of the *Fair Trading Act 1999* provides that a contract for the supply of recreational services may contain a term excluding or modifying liability for breach of the implied warranty. A person is not entitled to rely on the term if the relevant conduct was done with reckless disregard for the consequences of that conduct. However, section 32N(2) requires that the term be brought to the attention of the consumer prior to the supply of the recreational services. The *Fair Trading (Recreational Services) Regulations 2004* prescribe both the content and the form of the notice to be given of the term.

If the term is contained in a sign displayed at the place at which the recreational services are being supplied, or in a notice given to the consumer, the sign must include the following warning and note:

> WARNING: If you participate in these activities your rights to sue the supplier under the Fair Trading Act 1999 if you are killed or injured because the activities were not supplied with due care and skill or were not reasonably fit for their purpose, are excluded, restricted or modified in the way set out in or on this *sign/*notice.
>
> NOTE: The change to your rights, as set out in or on this *sign/*notice, does not apply if your death or injury is due to gross negligence on the supplier's part. "Gross negligence" is defined in the Fair Trading (Recreational Services) Regulations 2004.

If the notice is contained in a sign displayed at the place at which the recreational services are supplied, the warning and note must be in a font size at least equal to the largest font size used elsewhere in the sign, excluding the name or logo of the supplier.

If the term is contained in a form to be signed by the consumer, then it must include the following warning and note:

> WARNING UNDER THE *FAIR TRADING ACT 1999* Under the provisions of the *Fair Trading Act 1999* several conditions are implied

[38] This provision will presumably operate to void a provision of a contract that seeks to indemnify the supplier of recreational services in relation to a liability arising under the Commonwealth *Trade Practices Act*, something that the *Trade Practices Act* itself does not purport to prevent.
[39] Section 74H(4), *Fair Trading Act 1987* (SA).

> into contracts for the supply of certain goods and services. These conditions mean that the supplier named on this form is required to ensure that the recreational services it supplies to you are –
>
> · rendered with due care and skill; and
>
> · as fit for the purpose for which they are commonly bought as it is reasonable to expect in the circumstances; and
>
> · reasonably fit for any particular purpose or might reasonably be expected to achieve any result you have made known to the supplier.
>
> Under section 32N of the *Fair Trading Act 1999*, the supplier is entitled to ask you to agree that these conditions do not apply to you. If you sign this form, you will be agreeing that your rights to sue the supplier under the *Fair Trading Act 1999* if you are killed or injured because the services were not rendered with due care and skill or they were not reasonably fit for their purpose, are excluded, restricted or modified in the way set out in this form.
>
> NOTE: The change to your rights, as set out in this form, does not apply if your death or injury is due to gross negligence on the supplier's part. "Gross negligence" is defined in the Fair Trading (Recreational Services) Regulations 2004.

For the purposes of the regulations 'gross negligence' means that the act or omission was done or omitted to be done with reckless disregard, with or without consciousness, for the consequences of the act or omission.

Of course, in addition to the relevant warning and note, the contract itself must contain a term excluding, restricting or modifying liability under the implied warranty.

Western Australia

The position in Western Australia is identical to the position in New South Wales.[40]

Obvious risk: State and Territory Civil Liability laws

Apart from the provisions allowing a supplier of recreational services to exclude, restrict or modify liability for breach of the implied warranty in relation to services, a number of jurisdictions have also enacted provisions affecting

[40] See section 40, *Fair Trading Act 1987* (WA); section 5J, *Civil Liability Act 2002* (WA).

liability in relation to obvious risks.[41] The provisions are in general terms, and not limited to obvious risks associated with the provision of recreational services. However, in relation to such services the provisions relating to obvious risks will have a particular relevance.

New South Wales

The provisions of the *Civil Liability Act 2002* (NSW) dealing with obvious risks[42] appear in Part 1A, Division 4 of the Act, entitled 'Assumption of Risk'.

These provisions are not a codification of, nor do they supplant, the common law doctrine of *volenti*, but there will be some overlap in many cases between the operation of that doctrine and the statutory provisions.

What is an obvious risk?

An 'obvious risk' is defined by section 5F to mean 'a risk that, in the circumstances, would have been obvious to a reasonable person in the position of ' the plaintiff. It includes risks that are patent, or a matter of common knowledge. The risk of something occurring can be an obvious risk even though it has a low probability of occurring. It can also be an obvious risk even if the risk (or the condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

The scope of the 'obvious risk' provisions is dependant upon the approach taken by the courts to two aspects of the definition of 'obvious risk'. The first relates to the generality or particularity with which one describes the relevant risk that is said to be obvious. The second is the determination of 'the position' of the plaintiff for the purposes of ascertaining the obviousness to the hypothetical reasonable person in that position. To date, the courts have approached both aspects in a way which narrows the potential application of the 'obvious risk provisions'.

The danger of describing the risk at too great a degree of generality was considered by Bryson JA in *CG Maloney Pty Ltd v Hutton-Potts*.[43] In that

[41] In each of the Civil Liability Acts a reference to 'negligence' is a reference to liability to for failure to exercise due care and skill, whatever the cause of action sued upon. It will therefore include a claim based on the tort of negligence, a claim for breach of a contractual duty of care, as well as a claim based upon the implied warranty of due care in relation to services.

[42] Section 5I provides that there is no liability for materialisation of an inherent risk. 'Inherent risk' is defined to mean 'a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill'. It is difficult to see how, by definition, someone could be liable in negligence for the materialisation of such a risk, other than in a failure to warn case, which is expressly excluded from the section in any event. So it is difficult to see how the section could have any operative effect. See D Healey, "Warnings and Exclusions Post Personal responsibility" (2006) 1 *Australian and New Zealand Sports Law Journal* 7 at 14-5.

[43] *CG Maloney Pty Ltd v Hutton-Potts* [2006] NSWCA 136.

case the plaintiff was injured when she slipped on liquid polish that had been applied to a floor in a hotel but which had not yet been completely buffed. It was submitted by the defendant that the risk of slipping on a newly-polished floor was obvious. However, Bryson JA held that it was not the recent polishing of the floor that caused the injury. Instead, it was caused by polish on the floor, which was not visible, and which had not been removed in the buffing process. Bryson JA noted that the defendant's argument would mean:

> attributing to the reasonable person in her position discernment, as an obvious matter, that there may (even with a low degree of probability) be polishing material on the floor which was not visible. This is the risk which matured and caused her injury. Involved in this is not only advertence to what [the hotel employee] was doing, but advertence to the risk that he was not doing it properly.[44]

In *Fallas v Mourlas*[45] Mr Fallas and Mr Mourlas were members of four man party engaged in kangaroo shooting by spotlighting. Mr Mourlas was sitting in the passenger seat of the vehicle the men were using, when Mr Fallas returned to it with a loaded gun and sat in the driver's seat. Mr Fallas began cocking the gun back and forth as it was apparently jammed. Mr Mourlas asked him several times to stop and to point the gun out of the vehicle. Mr Fallas repeatedly assured him that the gun was not loaded and that it was safe. The gun accidentally discharged, injuring Mr Mourlas in the leg. All three judges agreed for the purposes of determining whether or not a risk was obvious, that nature of the risk should be identified by reference to the particular circumstances prevalent at the time of the shooting. Despite this agreement, however, they arrived at three different conclusions.

On the question of whether the risk that materialised was an 'obvious risk' for the purposes of section 5L, the Court of Appeal was divided. Ipp JA considered that the issue raised by the case was whether or not the risk of Mr Mourlas being harmed by conduct as extreme as that of Mr Fallas, which he considered amounted to gross negligence[46] was obvious. His Honour answered that question in the negative. In doing so, his Honour noted that in cases where the obvious risk is of being harmed by the conduct of another person, the obvious risk must at least be a risk of negligent conduct for section 5L to be relevant. In some cases the risk of a person being negligent may be obvious, but in the same circumstances the risk of a person being grossly negligent may not be so obvious. Mr Fallas' conduct consisted of baseless reassurances and persistent failure to take any steps to ensure that there would be no accidental discharge

[44] Ibid, at [174].
[45] *Fallas v Mourlas* (2006) 65 NSWLR 418.
[46] The distinction between 'negligence' and 'gross negligence' was discussed by Ipp JA at [51]-[55]. Ipp JA describes 'gross negligence', rather elliptically, as being 'negligence into an extreme degree'.

of the firearm, all in response to Mr Mourlas' requests that he be careful. That conduct was so extreme that the risk of being harmed by such conduct was not obvious within the meaning of section 5L.

Tobias JA held that it would have been apparent to a reasonable person in Mr Mourlas' position that the conduct of Mr Fallas in re- entering the vehicle with his handgun (which may or may not have been loaded to his knowledge) carried with it the risk of the gun being discharged causing serious harm. In the circumstances, Mr Mourlas should be taken to be aware that Mr Fallas' reassurances, that the gun was not loaded and that it was safe, were unreliable given his continued conduct in fiddling with his gun, which he had already indicated was jammed, in the confines of the vehicle.

Basten JA noted that if the risk that is said to have materialised is simply the risk of harm flowing from the accidental discharge of a gun whilst pointed at Mr Mourlas, that risk was undoubtedly obvious to Mr Mourlas and would have been obvious to any reasonable person in the circumstances. However, if the risk takes into account the assurances given by Mr Fallas that the gun was not loaded at the relevant time, then the risk may not be obvious. His Honour had regard to the fact that for statutory purposes a risk may be obvious even though the condition or circumstances that gives rise to the risk was not prominent, conspicuous or physically observable, and even though it has a low probability of occurring. Accordingly, the risk in question involved two elements: that the gun was loaded; and that it was pointed at Mr Mourlas.

His Honour held that there must have been a risk that there was a bullet in the gun prior to its discharge, even though Mr Mourlas had been assured that there was not. Similarly, there was a risk that Mr Fallas would point it at Mr Mourlas, even though that would be a careless act done in contravention of standard rules for the handling of firearms. Therefore the risk that materialised, namely the accidental discharge of a firearm whilst pointed at Mr Mourlas, was an 'obvious risk' whatever the knowledge, belief or circumstances that existed immediately prior to discharge.

These cases demonstrate that the determination of the relevant risk will to a significant degree depend upon the precise factual circumstances in each case. The utility of a catalogue of 'obvious risks' may be doubted, but it is perhaps worth noting the following:

- In *Fallas v Mourlas* Ipp JA suggested that the risk in a game of professional cricket of a batsman being struck on the arm by a ball thrown by a careless fielder after the ball was dead was arguably an 'obvious risk', as was the risk of a professional boxer being punched in the kidneys after the bell had rung for the end of a round.[47]

[47] *Fallas v Mourlas* (2006) 65 NSWLR 418 at 423-4.

- In *Jaber v Rockdale City Council* the NSW Court of Appeal upheld a trial judge's finding that the risk of injury from diving into water of shallow or uncertain depth was an 'obvious risk'.[48]
- In *Greenwood v Richmond Riparian Management Landcare Inc* Hungerford DCJ held that although the risk of slipping on a grassy slope was an obvious risk, the risk of an ankle injury resulting from the presence of a hole covered in grass that the plaintiff was unable to avoid as she slid down the slope was not an obvious risk.[49]

The assessment of whether or not a risk is obvious is to be made by postulating a hypothetical reasonable person in the position of the plaintiff. It has been held in a number of cases that in making that assessment, regard is to be had to the relative age and experience of the particular plaintiff. Thus, in *Doubleday v Kelly* the determination of whether or not the risk of injury from jumping on a trampoline while wearing roller skates was an obvious risk had to take into account the facts that the plaintiff was a child of seven, with no previous experience in the use of trampolines or roller skates, who chose to get up early in the morning and play unsupervised.[50] In *Great Lakes Shire Council v Dederer* the circumstances were diving from a bridge nine metres above the water and 10 metres from a visible sand bar. The NSW Court of Appeal held that the determination of whether the risk of injury was an obvious risk had to have regard to the fact that the plaintiff was at the time of the accident a fourteen year old boy, and the reasonable person in the position of the plaintiff was a reasonable person possessed of such knowledge as the plaintiff in fact had as to the knowledge of the area and the conditions at the time.[51]

Perhaps the extreme example of the potentially subjectivity of the inquiry was that in *Smith v Perese*. There the defendant submitted that the risk of a spearfisherman being struck by a watercraft in circumstances where he was not displaying a dive flag, was not in the vicinity of a boat and was diving in an area where watercraft might be encountered, was an obvious risk. Studdert J disagreed, noting that the plaintiff:

> … was fishing in company in an area with which he was familiar in what he perceived to be good conditions; he was using a float, which … he believed to be conspicuous; he was fishing in an area commonly fished by spearfishermen; his companion was nearby with another conspicuous float; both men were in reasonable proximity to the shoreline.[52]

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[48] *Jaber v Rockdale City Council* [2008] NSWCA 98 at [38]-[41].
[49] *Greenwood v Richmond Riparian Management Landcare Inc* [2007] NSWDC 185 at [79].
[50] *Doubleday v Kelly* [2005] NSWCA 151 at 28.
[51] Per Handley JA at [152] and [172].
[52] *Smith v Perese* [2006] NSWSC 288 at [78].

These might all be good reasons for holding that the plaintiff was not in fact aware of the risk, but they seem to require a description of the relevant risk to a high degree of particularity. It would also seem to take a highly subjective view of the plaintiff's position.

Having regard to the approach taken in the few cases that have considered the definition of obvious risk, the proposition that the risk of injury from dangers such as Irukandji jellyfish may be an obvious risk to locals but not an obvious risk to a foreign tourist must surely be correct.[53]

The consequences of finding a risk to be obvious

Assuming that the relevant risk is found to be obvious (not, one might have thought, an easy task), section 5G provides that: 'in determining liability for negligence, a 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'. It continues, to provide that 'a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk'.

This section, therefore, provides an evidentiary presumption that, if not displaced by the plaintiff, will assist a defendant in establishing the requisite awareness of risk necessary to make good the defence of *volenti* at common law.

Further, section 5H provides that except in limited circumstances, a defendant does not owe a duty of care to another person to warn of an obvious risk to the plaintiff. The main exception likely to apply in the case of the provision of recreational services is section 5H(2)(a), the effect of which is that a defendant may[54] still come under a duty of care to warn a plaintiff of an obvious risk if the plaintiff has requested advice *or information* about the risk from the defendant. Another possible exception, although it would seem less likely, is section 5H(3), the effect of which is that a professional may still owe a duty to warn a plaintiff of an obvious risk if the risk is the risk of death or injury to the plaintiff from the provision of a professional service by the defendant. The section is directed towards the duty to warn owed by health professionals to patients.[55] However, one can readily imagine an argument to the effect that certain providers of recreational services are professionals, and therefore section 5H does not operate to relieve them of the consequences of failing to warn of the risk of injury or death associated with the services they provide, no matter

[53] RJ Douglas, GR Mullins, SR Grant, *The Annotated Civil Liability Act 2003* (Qld) (2ed), LexisNexis, 2008, at 119.

[54] 'May' because section 5H(3) provides that subsection 5H(2) does not give rise to a presumption of a duty to warn of a risk.

[55] See also section 5P, *Civil Liability Act 2002* (NSW).

how obvious that risk might be. The common law may nonetheless operate to defeat such a claim without statutory assistance in any event.

Other States and Territories

Most of the other jurisdictions have enacted provisions similar to the obvious risk provisions in New South Wales. Neither the ACT[56] nor the Northern Territory legislation[57] includes provisions relating to obvious risks.

The definition of obvious risk is identical in Western Australia,[58] while in South Australia it replicates the New South Wales definition except that it does not include the provision to the effect that a risk can still be obvious even if it (or the conditions giving rise to it) is not conspicuous or observable.[59]

The definitions in Queensland[60] and in Victoria[61] include an additional aspect to the definition, declaring that 'a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless the failure itself is an obvious risk.' The examples given in the Queensland legislation are as follows:

1 A motorised go-cart that appears to be in good condition may create a risk to a user of the go-cart that is not an obvious risk if its frame has been damaged or cracked in a way that is not obvious.

2 A bungee cord that appears to be in good condition may create a risk to a user of the bungee cord that is not an obvious risk if it is used after the time the manufacturer of the bungee cord recommends its replacement or it is used in circumstances contrary to the manufacturer's recommendation.

Arguably, this additional aspect of the definition in those jurisdictions is implicit in the New South Wales definition, particularly having regard to the discussion by Ipp JA in *Fallas v Mourlas*.

In Tasmania[62] the definition is the same as in New South Wales but adds an additional qualification that a risk will not necessarily be obvious even if a warning has been given in relation to that risk.

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[56] *Civil Law (Wrongs) Act 2002* (ACT).
[57] *Personal Injuries (Liabilities and Damages) Act 2003* (NT).
[58] Section 5F,*Civil Liability Act 2002* (WA).
[59] Section 35, *Civil Liability Act 1936* (SA).
[60] Section 13, *Civil Liability Act 2003* (Qld).
[61] Section 53, *Wrongs Act 1958* (Vic).
[62] Section 15, *Civil Liability Act 2002* (Tas).

The presumption of knowledge of obvious risks provided for by section 5G of the NSW legislation is replicated in identical terms in Western Australia,[63] while in Queensland,[64] South Australia[65] and Tasmania[66] the presumption is expressed to apply in the same terms where 'a defence of voluntary assumption of risk is raised by the defendant and the risk is an obvious risk'. In Victoria[67] it is replicated but is expressed to not apply to the provision of professional services that, arguably, could include various services provided in relation to recreational activities such as coaching and advisory work.

Dangerous recreational activity: State and Territory Civil Liability laws

A number of jurisdictions have enacted provisions addressing liability for the materialisation of obvious risks of dangerous recreational activities.

New South Wales

The provisions of Part 1A, Division 5 of the *Civil Liability Act 2002* (NSW) is entitled 'Recreational activities' and deals with liability in negligence for harm resulting from a recreational activity engaged in by the plaintiff.

Section 5L provides that a defendant is not liable in negligence for harm suffered as a result of the materialisation of an obvious risk[68] of a dangerous recreational activity engaged in by the plaintiff, irrespective of whether or not the plaintiff is in fact aware of the risk.

A 'dangerous recreational activity' is a recreational activity that 'involves a significant risk of physical harm'.[69]

In *Fallas v Mourlas* the New South Wales Court of Appeal considered the meaning of the word 'significant' in qualifying the word 'risk' in the definition. Ipp JA, noting his decision in *Falvo v Oztag Sports Association*[70], confirmed that an assessment of whether a risk is significant includes a consideration of both the degree of probability of harm occurring and the severity of that harm, so that a risk may be significant, even if the probability of it occurring is low, if the ensuing harm is (or is potentially) catastrophic. Beyond saying that it lay '… somewhere between a trivial risk and a risk likely to materialise', it was incapable of further definition. Tobias JA held that a significant risk is one '… which is not merely trivial but, generally speaking, one which has a

[63] Section 5N, *Civil Liability Act 2002* (WA).
[64] Section 14, *Civil Liability Act 2003* (Qld).
[65] Section 37, *Civil Liability Act 1936* (SA).
[66] Section 16, *Civil Liability Act 2002* (Tas).
[67] Section 54, *Wrongs Act 1958* (Vic).
[68] "Obvious risk" has the same meaning as in section 5F.
[69] Section 5L, *Civil Liability Act 2002* (NSW).
[70] *Falvo v Oztag Sports Association* [2006] NSWCA 17.

real chance of materializing', noting that his test is closer to the upper end of Ipp JA's scale.[71] Basten JA noted that if the harm is potentially catastrophic, then a very low level of risk may be regarded 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.[72] Unfortunately, the three judgments in *Fallas v Mourlas* speak in very different (and at times confusing and contradictory) terms, and there is a tension between those judgments, and a tension between that decision and *Falvo v Oztag Sports Association*. There is therefore no sure guidance emanating from the Court of Appeal at this stage as to what 'a significant risk of physical harm' means.

Fallas v Mourlas also raised the question of what was the recreational activity in which Mr Mourlas was engaged in at the time he was shot.[73] Ipp JA held that the activity he was engaged in was 'sitting in the vehicle, holding the spotlight for the shooters outside, on the basis that at various times one or more of the shooters might leave or enter the vehicle with firearms that might or might no be loaded.' That was distinguishable and separate from the other activities that might fall under the description of 'shooting kangaroos by spotlight.'[74] Basten JA, on the other hand, said:

> once the activity was identified as shooting kangaroo at night, and the relevant risk was identified as a wound caused by accidental discharge from a firearm, I do not think it is possible to characterise a person who merely drives, or who merely holds a spotlight, as not involved in the activity, because they are not involved in the actual shooting.[75]

The importance of describing the relevant activity at an appropriate level of generality is illustrated by two examples given by Ipp JA:

> [41] Assume that a plaintiff is fearful of heights but agrees to assist a friend during an abseiling expedition. The plaintiff stands at the top of a cliff (in what ordinarily would be regarded as a safe position) and acts as a belay, pulling the rope as his friend descends down the cliff. At no time does the plaintiff intend to abseil down the cliff himself. Assume that he is severely injured because of the negligence of a third party responsible for affixing the abseiling equipment and selecting an appropriate location for the abseiling to take place. Assume further that such negligence amounts to the materialisation of an obvious (but not significant) risk involved in

[71] *Fallas v Mourlas* [2006] NSWCA 32 at [90]-[91].
[72] Ibid at [131], [136].
[73] See also *Mikronis v Adams* (2004) 1 DCLR 369 where Dodds DCJ held that the recreational activity in issue in that case was not horse riding but 'a trail ride on a horse'. Whether the apparent distinction made any difference is not clear from the judgment.
[74] *Fallas v Mourlas*[2006] NSWCA 32 at [75].
[75] Ibid at [128].

> abseiling. If the plaintiff is to be regarded as having participated in abseiling, generally, and not merely acting as a belay, it would follow that he would be held to have engaged in a dangerous recreational activity. Section 5L would apply and he would have no claim for negligence. In my view, that would be an unfair result. On the other hand if regard is had only to the limited activities which this notional plaintiff was undertaking, he was arguably not engaged in a dangerous recreational activity and his claim would then not be defeated by s 5L.
>
> [42] Another example illustrates the converse situation. Assume that a boy in his early teens visits a zoo. That would be a recreational activity but not a dangerous one. Assume that the boy notices that the fencing to the antelope enclosure has no barbed wire at the top and no measures have been taken to prevent persons from climbing over. He proceeds to climb over, enters the enclosure and is gored by a buck. He sues the Authority that controls the zoo on the ground that it knew that young persons visited the zoo, would be attracted to the animal enclosures, and the more adventurous might attempt to enter them. He alleges that the Authority was negligent in having a fence that young people could readily climb. If the activity engaged in by the boy in this example is not segmented, and he is regarded merely as having been engaged in the recreational activity of visiting the zoo, s 5L would not apply. This would be the case even though the harm the boy suffered was caused by the materialisation of an obvious risk of a recreational activity that, by reference to the actual facts, was dangerous (and brought about by him).

Ipp JA then noted that these potential situations of unfairness and injustice can be avoided if the scope of the recreational activity is determined by reference to the particular activities actually engaged in by the plaintiff at the relevant time, enabling a decision to be made by reference to the actual circumstances giving rise to the harm.

One issue that arises and has not been finally determined is whether the obvious risk that materialises must be a 'significant risk' in order for section 5L to apply. In *Fallas v Mourlas* Ipp JA held that a significant risk that converts a recreational activity into a dangerous recreational activity may be an entirely different risk from the risk (which may be obvious or not) that materialises.[76] Basten JA held to the contrary, saying that in order for section 5L to be engaged at least one of the significant risks must be the risk that materialises resulting in harm.[77] Tobias JA does not expressly consider the issue.

[76] Ibid at [25].
[77] Ibid at [151].

The difficulties in applying the caselaw on section 5L can be readily illustrated. Suppose the referee of a game of rugby was running downfield and tripped in a hole in the ground where a sprinkler box had once been located but had been negligently in-filled, and in the process of falling to the ground experienced a severe flexion to his neck, rendering him paralysed. There is no doubt the referee is engaged in a recreational activity. But what recreational activity? One approach would be to describe the recreational activity as the game of rugby. If so, then it can readily be described as an activity in which there is a significant risk of physical harm. But is the harm that has materialised (ie paralysis) an obvious risk of that activity? If one considers the game of rugby in the abstract then the answer is probably "yes". This leads to the somewhat counterintuitive proposition that a referee who is paralysed not by being tackled or rucked or mauled but by tripping in the surface of a ground, cannot recover damages for that eventuality. Yet the caselaw seems to require a consideration of more subjective features of the circumstances in which the harm befalls our referee. So that rather than considering rugby in the abstract, consideration must be given to the form of participation by our referee. One way of doing that is by refining the description of the recreational activity in which the referee is engaged: the recreational activity is not the game of rugby, but is the activity of refereeing a game of rugby. So described, the risk of paralysis is less likely to be seen as an obvious one. Another approach is to refine the description of the relevant risk: the risk that has materialised is the risk of paralysis in the course of tackling, or being tackled, or whilst scrimmaging. While that is an obvious risk of the game of rugby, it is not the risk that has materialised. Yet another approach might be to say that the risk that has materialised is the risk of physical injury from tripping in deformities in the surface of the playing field. While that may be an obvious risk of participating in the game of rugby, whether one is a player or a trainer or an official, it is not that risk which is what makes the game of rugby dangerous in the sense of involving a significant risk of physical harm.

If one of the objectives of the legislative reforms enacted in response to the Ipp Report was to provide more certainty in the law, then that objective has to date not been achieved.

Other jurisdictions

Each of Queensland,[78] Tasmania[79] and Western Australia[80] have enacted provisions in basically the same terms as New South Wales whilst the other jurisdictions do not have legislation specifically addressing liability for the materialisation of obvious risks of dangerous recreational activities.

[78] Section 19, *Civil Liability Act 2003* (Qld).
[79] Section 20, *Civil Liability Act 2002* (Tas).
[80] Section 5H, *Civil Liability Act 2002* (WA).

Risk warnings: State and Territory Civil Liability laws

Section 5M of the New South Wales *Civil Liability Act 2002* provides that a defendant does not owe a duty to take care to a plaintiff who engages in a recreational activity in respect of a risk of the activity, if that risk was the subject of a risk warning to the plaintiff. The only other jurisdictions to have provisions equivalent to section 5M are Tasmania[81] and Western Australia.[82]

A risk warning is a warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity. It is not necessary that the plaintiff actually receive or understand the warning, nor is it necessary that the plaintiff be capable of receiving or understanding the warning. The warning may be given orally or in writing.

The fact that a particular plaintiff was not in fact warned of the risk is irrelevant, so long as people generally would have been warned of the risk. But how is that to be determined? For example, is a warning given in English 'reasonably likely to result in people being warned' even though it will certainly not have that effect on a non-English speaker? The fact that it is not necessary that a person understand the warning suggests that the answer may be yes. However, it is arguable that if the provider of recreational services is providing their services predominantly to non-English speakers, or does so on a particular occasion, then a risk warning given only in English may not be sufficient. Whether or not it is sufficient may depend upon the relationship between the plaintiff and the defendant, so that a tour guide (with a narrow audience) may be in a different position to the operator of a recreational facility (with a much broader potential audience).

Where a plaintiff is incapable of understanding a risk warning by reason of youth or a physical or mental disability (an incapable person), the defendant is only entitled to rely upon a risk warning if either the plaintiff, undertaking the recreational activity, was under the control of or accompanied by another person to whom the risk warning was given (that other person not being an incapable person or the defendant) or the risk warning was given to a parent of the plaintiff, whether or not the plaintiff was under the control of or accompanied by the parent while engaged in the recreational activity.

A defendant is not entitled to rely upon a risk warning unless it is given by or on behalf of the defendant, or by or on behalf of the occupier of the place where the recreational activity is engaged in. So, it would seem, a tour guide who is sued by a tourist may rely upon a risk warning given by the occupier of a recreational facility, but the occupier of the recreational facility cannot rely upon a risk warning given by the tour guide, unless it can be established that the risk warning given by the tour guide was given on its behalf.

[81] *Civil Liability Act 2002* (Tas), section 39.
[82] *Civil Liability Act 2002* (WA), section 5I.

A risk warning does not need to be specific to the particular risk, and can be a general warning of risks that would include the particular risk concerned. However, in order to rely upon a general warning of risks, the risk warning must disclose the general nature of the risks. So, for example, it may be sufficient to warn spectators coming onto the field after a football game that there are dangers associated with the presence of a large number of spectators on the field without specifying the particular risks of injury from flying objects such as bottles or footballs or from other people being in an intoxicated state.[83] Taking the facts of *Woods v Multi-Sport Holdings Pty Ltd*[84] as another example, in warning of the risks of playing indoor cricket it should be sufficient to warn of the dangers resulting from the fact that the game is played in a confined space and that there is a risk of injury from being hit by the ball, the bat or another player, without specifically identifying the risk of damage to a player's eyesight from the fact that the malleable ball used in the game was able to impact on the surface of the eyeball rather than simply the bone around the eye-socket.[85]

Indeed, more specifically identifying the risks and activities serves only to narrow the scope of what might otherwise be a general warning of risks. For example, a sign at the Roundhouse at the University of New South Wales under the heading 'General Risk Warning', said to be '*Under the Civil Liability Act 2002*', contains the following warning:

CROWD SURFING, STAGE DIVING, MOSHING AND/OR ENTERING THE "MOSH PIT" CAN BE HARMFUL TO ONE'S PERSONAL SAFETY.

REMEMBER

PATRONS MUST TAKE PERSONAL RESPONSIBILITY FOR THEIR OWN SAFETY

One can readily see how this would provide a defence[86] to a claim by a person injured in the course of a concert as a result of one of the various activities specifically described. Arguably it is too narrow for it will not obviously apply if someone is injured not as a result of their own conduct, but as innocent

[83] The example given in the text is taken from the New South Wales Government's "Position Paper" on the "Consultation Draft" of the Civil Liability Bill, which is available at <http://www.lawlink.nsw.gov.au/report/lpd_reports.nsf/pages/civil_bill_2002>.

[84] *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460.

[85] Compare the sign that McHugh J (in dissent) considered should have been erected: at [80]. See also Gleeson CJ at [43].

[86] It would be an interesting question as to whom the defence would be available. It is not apparent from the sign who is giving the warning, nor on whose behalf it is being given: see section 5M(6). If it is being given by the occupier of the Roundhouse then it will assist all defendants. But if it is given by, say, a particular event organiser then it will not assist other potential defendants (such as the occupier) unless it can be established it was given on their behalf. It would seem prudent therefore for contractual arrangements between those participating in the organisation and conduct of recreational activities to make provision for risk warnings to be given by one person on behalf of all.

bystanders injured by the stage diving or crowd surfing by others. It is almost certainly not sufficient to provide a defence in respect of other potentially injurious behaviour.

A defendant is not entitled to rely upon a risk warning in the following circumstances: if the harm resulted from a contravention of a written law of the State or the Commonwealth that establishes specific practices or procedures for the protection of personal safety; to the extent that the risk warning was contradicted by any representation as to risk made by or on behalf of the defendant to the person; or if the plaintiff was required to engage in the recreational activity by the defendant. It is not clear what circumstances will amount to 'requiring' a person to engage in the recreational activity. School children, for example, may feel compelled to participate in some sporting or other recreational activity (or alternatively, such participation may be a condition of continued enrolment), even though the school could not legally compel them to participate.

Section 5M was considered in the decision of the New South Wales Court of Appeal in *Belna Pty Ltd v Irwin*.[87] In that case the plaintiff sued a gym when she injured her knee whilst lunging, an exercise that had been prescribed for her as part of an exercise regime developed by an employee of the gym. The plaintiff relied upon the terms of a questionnaire she had completed in which it was stated:

> I understand that Fernwood Fitness Centre is not able to provide me with advice in regard to my medical fitness and that this information is used as a guideline to the limitations to my inability to exercise. I will not hold this club liable in any way for the injuries that may occur while I am on the premises.

Unsurprisingly, it was held that this acknowledgement did not warn the plaintiff about any risk involved in the lunge or any other exercise she undertook, and therefore was not a risk warning in terms of section 5M.

In *Mikronis v Adams,*[88] Dodds DCJ considered the effect of a sign in the following terms:

> ***Attention***
>
> *Wollombi Horse Riding Centre* informs you that horse riding is concidered [sic] a *dangerous activity*. Whilst all care and precautions are taken, no responsibility for either *personal injury or property damage* will be maintained by Wollombi Horse Riding Centre or its employees. *This activity is conducted at your own*

[87] *Belna Pty Ltd v Irwin* [2009] NSWCA 46.
[88] *Mikronis v Adams* (2004) 1 DCLR 369.

> *risk*. Safety hats are provided and must be worn by youths 18 years and under. I understand the meaning and effect of these conditions and acknowledge by way of signature. *Minors must have parental approval*. (emphasis original)

In this case the plaintiff fell from a horse while trail riding, when the saddle on which she was mounted slipped around the girth of the horse she was riding. Dodds DCJ held that the placement of the sign, being affixed to the wall in the stables/yard area, was not sufficient to bring it to the plaintiff's attention, especially having regard to the fact that it was in small lettering underneath a much larger sign that said BARN-STAY ACCOM AND CLAY PIGEON SHOOTING and there was therefore no reason for anybody to think the sign contained a warning, or had anything to do with horse riding.

However, the plaintiff had in fact signed a form with words to similar effect, and so it was necessary to consider the effect of the content of the sign in any event. First, Dodds DCJ considered that the words appearing on a document that had been signed by the plaintiff, if they conveyed a warning then the warning had been given to her within the meaning of section 5M. Second, Dodds DCJ considered that the words conveyed a warning of the risk of personal injury. However, Dodds DCJ held that the relevant risk that materialised was not the risk of falling from a horse, but the risk of a slipping saddle. The warning conveyed by the words on the form (ie of a risk of personal injury) was not 'a general warning of the risks that include the particular risk concerned'. So, what would have been a sufficient warning? Dodds DCJ thought that a warning 'of the possibility of equipment failure generally' would have been sufficient, and this conclusion would seem to be correct. However, somewhat surprisingly given that the warning of the risk of personal injury was apparently not sufficient, Dodds DCJ also thought that a warning 'of the possibility of falling off' would also satisfy the requirements of section 5M.

Dodds DCJ also held that the statement 'all care and precautions are taken' contradicted the risk warning, and therefore section 5M(8) prevented the defendant from relying upon it in any event. The reasoning was as follows:

> If all care and precautions had been taken [the saddle] would have been properly fastened. If it had been properly fastened it would not have slipped. … therefore the representation by the riding centre that all care and precautions are taken contains by strong implication the representation that the saddle will not slip. Therefore the defendant would not be able to rely on the notice on the form even if it were held to warn of the relevant risk.

Given a number of other decisions interpreting the *Civil Liability Act 2002* it is perhaps too bold to say that this is clearly wrong. However, the following observations may be made. First, it is not clear that the statement 'all care and precautions are taken' is a statement as to risk as is required in order for section 5M(8) to have any operation at all. Second, those words in isolation on one view still carry with them the implication that there is some risk notwithstanding that 'all care and precautions are taken'. The 'but' may be taken as given. When read in context, however, it is difficulty to see how the words 'all care and precautions are taken' can be said to in any way contradict the words 'horse riding is considered a dangerous activity.' They are perfectly capable of sensible, and one would have thought common, co-existence.

Difficulties created by the current regimes

The first recommendation of the Ipp Report was that each of the other recommendations should be incorporated in a single statute to be enacted in each jurisdiction. The Ministerial communiqué announcing the appointment of the Ipp Panel had noted that one of the Panel's function was to assist in 'developing consistent national approaches for implementing measures to tackle the problems of rising premiums and reduced availability of public liability insurance'. The Panel itself noted that participants in the consultation phase had 'stressed the desirability of enacting measures to bring the law in all the Australian jurisdictions as far as possible into conformity.' The Ipp Panel left no doubt as to its position when it stated:

> The Panel unqualifiedly supports this aspiration and would urge upon those with the responsibility of deciding on measures to implement our recommendations to give it their serious consideration.

Almost immediately the Ipp Report's first recommendation became the first casualty of the implementation process. As described above, there is no uniform approach to the issues that confront the suppliers of recreational services on a daily basis.

There are three particular difficulties created by the disparate approaches adopted by the various jurisdictions.

Interaction between Trade Practices Act and the State and Territory Regimes

It has been noted above that section 74(2A) of the *Trade Practices Act* purports to enable the State and Territory regimes to work alongside that Act, and in particular to enable them to operate notwithstanding what would otherwise be non-excludable warranties implied by the Act. However, it is not clear that the section is effective to achieve this aim.

Take, for example, a recreational activity where protective equipment is supplied by the operator of the facility. Section 74 seems to draw a clear distinction between the supply of services and the supply of materials in connexion with those services, and implies a warranty separately in respect of each. Section 68B, which enables the provider of recreational services to exclude, restrict or modify liability under section 74, is limited to the application of section 74 to the supply of recreational services and does not, it would seem, extend to the supply of materials such as protective equipment. There is therefore, under the Commonwealth regime, a non-excludable warranty in respect of those materials. However, in New South Wales and Western Australia for example the liability for failure of protective equipment could be avoided by a suitably-worded risk warning. It is not apparent that the risk warning provisions can be said to be a law of a State that preclude or limit liability for breach of a term of the contract between the provider of recreational services and the participant, within the meaning of section 74(2A). It is therefore not clear whether the provider of recreational services is able to exclude liability arising out of the failure of protective equipment provided to participants.

Disparate regimes between the States and Territories

The variation between jurisdictions means that a national governing body cannot readily perform one of its useful functions – providing its members with advice and standardised documentation such as waiver forms to protect members against liability to participants. Necessarily, these must be prepared and provided on a state and territory basis.

Provision of recreational services to minors

Regrettably, the position in relation to the provision of recreational services to minors has not been resolved. The legislators in most jurisdictions seem to be unaware of the difficulty in enforcing a contractual waiver of liability against a minor, and even in New South Wales which at least allows for 'risk warnings' to be effective against minors nonetheless says nothing about the exclusion of liability to a minor under the imposed by the implied warranty under the *Fair Trading Act*.

It is sometimes suggested that a contractual term excluding liability for personal injury is not for the benefit of a minor, whether taken alone or in the context of the overall agreement.[89] Whether that proposition is correct may be debatable, at least with respect to the last part of it. But whatever be the correct position, it is desirable there should be some certainty about it. And it is desirable that the same position should obtain whether the services are provided to a child in New South Wales, or provided to a child in (say) Victoria.

[89] See, for example, Healey, note 41 at 10.

It remains anomalous that both parents and more mature minors are lawfully able to make decisions about momentous life decisions relating to medical treatment (for example) and yet those same people are incapable in most jurisdictions of contractually excluding liability for recreational activities in which they may wish to participate.

It is time for the Commonwealth and the States and Territories to adopt an integrated national approach to the liability of the providers of recreational services, and in particular one that strikes an appropriate balance between the interests of those providers, and those who wish to participate in and obtain the benefit of those services, including (and in particular) minors.

Conclusion

As noted above, there are particular problems generated by the fact that there are nine disparate legislative regimes governing the supply of recreational services in Australia. For reasons of administrative efficiency, and for reasons of fairness, this is undesirable.

Alongside those difficulties, as has been demonstrated already in the limited case law that has considered the New South Wales provisions, the legislation that has been enacted is problematic. It is open to vastly different interpretations none of which has gained universal acceptance, further complicating the ability of national and state governing bodies to provide advice to members or produce standardised participation agreements.

There needs to be some uniformity in legislative approach. Whatever legislative approach is adopted, it needs to more clearly articulate what is meant by terms such as 'obvious risk', and 'significant risk of physical harm'. There needs to be a clear legislative statement of the interaction between the Commonwealth regime and the regimes adopted by the States and Territories. Moreover, the legislative regimes need to clearly articulate a position in relation to minors that appropriately reflects the decision-making role of parents in recreational activities engaged in by children, and acknowledges the important benefits provided to children by such participation.

Most importantly, whatever legislative regime is adopted, it needs to be drafted with the input of those who have some expertise in the law as it applies to the provision of recreational services. There is a particular insight gained by providing advice in such matters on a daily basis that enables the difficulties created by the current regimes to be identified, and at least minimised, but hopefully avoided. It is difficult to imagine that anyone who works in the area could not have foreseen the different meanings that might be attributed to, for example, 'significant risk of physical harm', and thereby avoided any ambiguity.

Ultimately, both the legislatures and the courts need to provide greater certainty to the providers of recreational services to enable them to assess and appropriately manage their risks.