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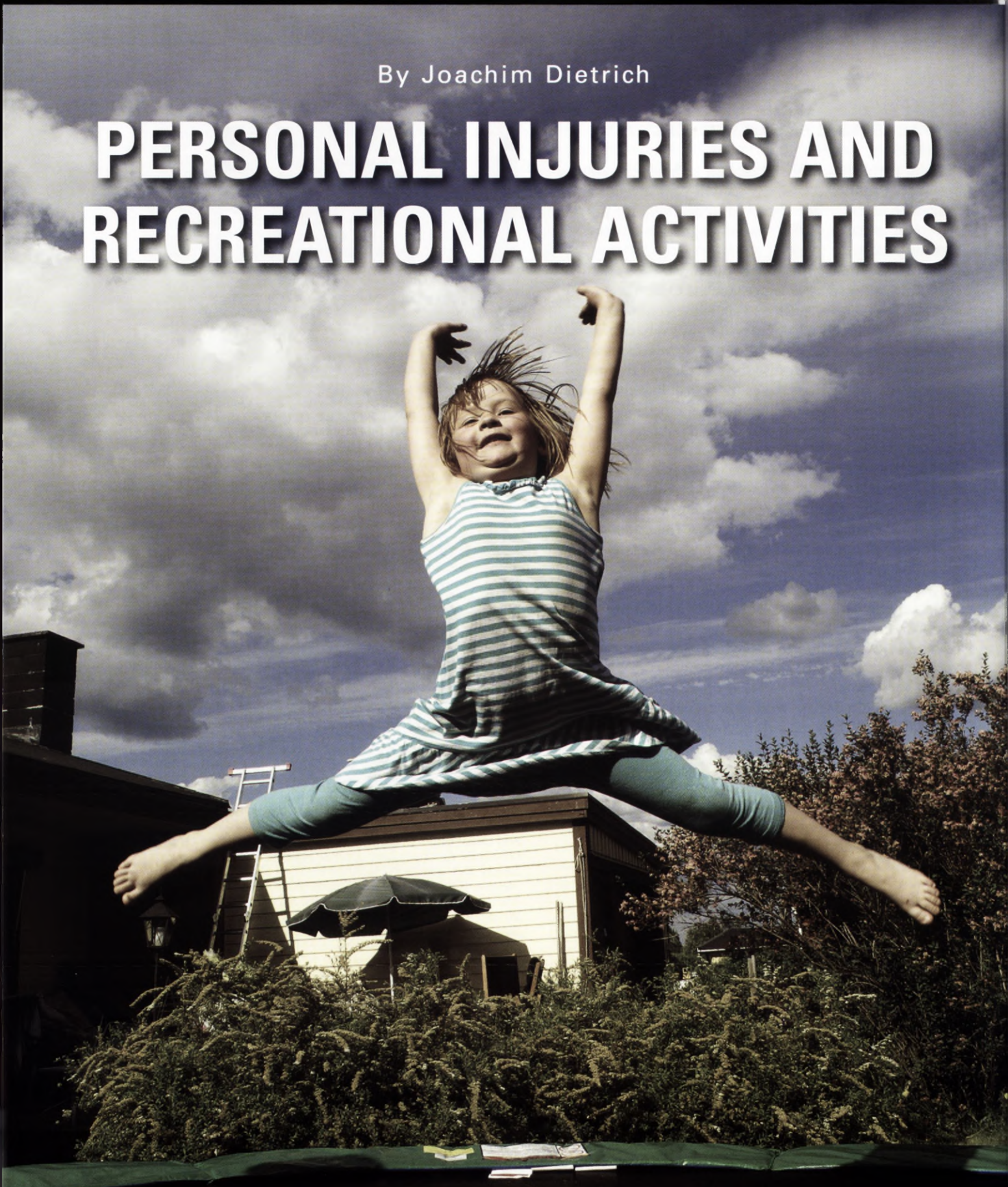
PERSONAL INJURIES AND RECREATIONAL ACTIVITIES



Participation in sport and recreation is one of the most significant causes of personal injury in Australia,[1] and many such injuries are of a serious or lasting nature. So the relevant liability rules constitute a practically important area of law.

A person negligently injured in the course of recreational activities may sue the defendant provider of recreational services either in negligence, for breach of contract or, now, for failure to comply with one of the statutory guarantees contained in the *Australian Consumer Law* (ACL). Alternatively, the injured party may also sue defendants such as other participants in the activities, the occupiers of premises on which the activities took place, or the supervisors of the activities and the like, in negligence. Unfortunately, the law governing liability arising from negligently caused personal injury in the course of recreational activity is surprisingly complex.

This complexity is the result of a number of inter-related factors:

1. The existence of different defences in each of the state and territory Civil Liability Acts (CLAs), dealing with recreational activities.
2. The interaction between the law of negligence and the ACL statutory guarantees.
3. The capacity of recreational service providers in some circumstances to exclude liability for breach of the ACL statutory guarantees and, therefore, for the tort of negligence and for breach of contract as well, by means of contractual exclusion clauses.

This article briefly considers these factors and some of the issues that arise as a result of the interplay between the various sources of legal regulation.

DEFENCES RELEVANT TO RECREATIONAL ACTIVITIES

A number of defences apply to recreational activities, either as a matter of definition, or more broadly but with considerable potential to operate in the context of recreational activities. Unfortunately, these defences are not applicable in all jurisdictions and also differ in minor ways between those jurisdictions that have adopted them.

All states, except Victoria and the Territories, deny the existence of a duty to warn in relation to obvious risks.[2]

Importantly, although a failure to warn of an obvious risk does not give rise to liability, a plaintiff may nonetheless succeed in his or her action if s/he can show that other reasonable steps were open to the defendant to discharge a duty of care, and where reasonableness dictates that such steps should have been taken to alleviate the risk.[3]

The term 'obvious risk' is defined broadly in the various provisions, as any risks obvious to a 'reasonable person in the position of' the plaintiff.[4] There are, however, some differences in the details in each jurisdiction's relevant section.

Section 5F of the CLA (NSW) states:

'(1) 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.
(2) Obvious risks include risks that are patent or a matter of common knowledge.
(3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.
(4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.'

Although the test is objective, the issue is one of whether 'the probability of [the risk's] occurrence is or is not readily apparent to the reasonable person in the position of the plaintiff'.[5] Subjective factors such as 'age, experience and personal characteristics' are relevant to the determination.[6] Therefore, in *Doubleday v Kelly,*[7] the NSW Court of Appeal held that the risks of rollerblading on a trampoline were not obvious to a reasonable seven-year-old girl.

Some examples of the determination of 'obvious risk' include diving cases, in which courts have repeatedly held that sustaining serious injury is an obvious risk of diving into water of unknown depth;[8] similarly, being hit by a golf ball struck without prior warning by a fellow golfer is an obvious risk of golf, at least where the plaintiff knew that the defendant was about to take his or her shot.[9] In a case that predates the CLAs, *Woods v Multi-Sport Holdings Pty Ltd,*[10] >>

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the majority, Gleeson CJ, Hayne and Callinan JJ, treated the risk of being hit in the eye and suffering serious injury while playing indoor cricket as 'obvious'[11] and therefore did not consider that the defendant was in breach of duty for failing to warn of such a risk.

The degree of precision or generality with which one states the 'risk' in question will impact on the conclusion.[12] For example, what needs to be obvious is more than the end result of an activity – such as falling off a horse – but rather the manner in which the risk materialised must also have been obvious – such as falling off a horse as a result of the saddle slipping.[13]

In two states, Queensland and Victoria, the legislation has clarified this question, at least in relation to where the negligence relates to the maintenance, care and so on of a 'thing'. The CLA (Qld), s13(5) provides that:

> 'To remove any doubt, it is declared 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.'[14]

In four states, plaintiffs engaged in a 'dangerous recreational activity' are disentitled from bringing action for harm caused by the 'materialisation' of an obvious risk of that activity.[15]

The definition of recreational activity is generally very broad; hence, the focus of most litigation, particularly in NSW, has turned on the meaning of 'dangerous recreational activity' (s5L), which is defined as one involving a significant risk of harm (s5K). The term 'significant' has been held to bear on both the likelihood of that risk eventuating *and* the potential seriousness of any injury. In other words, the significant risk or probability of harm must also be one of some *significant* injury, such that a 'significant risk of insignificant injury' would not qualify.[16] Further, a significant risk means one somewhere between a 'trivial risk and a risk likely to materialise'.[17] It has been held in applying this definition that diving into water of uncertain depth off a wharf[18] is a dangerous recreational activity; so is kangaroo shooting at night;[19] or riding a BMX bike on a skate park;[20] but playing 'Oztag', a touch football game[21] and calm water cruising[22] are not. Similarly, diving off a boat anchored in a shallow bay into darker coloured water that gave 'the appearance of depth',[23] was held not to be dangerous in those circumstances. Importantly, all of 'the particular circumstances in which the activity was being undertaken' are relevant in determining the dangerousness of it.[24]

Two states, NSW and Western Australia (WA), have provisions that excuse defendants for any liability in relation to risks in respect of which the defendant has given a 'risk warning'. The two provisions, s5M, CLA (NSW) and s5I, CLA (WA), are similar, but not identical. The provisions are complex and long; there has been little successful use of those provisions, in part, one might assume, because of their complexity.

One of the reasons why it may be difficult to rely successfully on these provisions is that 'a risk warning to a person in relation to a recreational activity 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': s5I(4), (CLA (WA); s5M(3), CLA (NSW). This requires a careful analysis of the type of risk that caused the harm, as well as whether the wording and interpretation of the warning incorporates that risk. General statements such as that the participants engage in the activity at their 'own risk' will generally not amount to a risk warning. For example, a warning that horse-riding

is dangerous and that riders ride at their own risk does not warn of the specific risk of the saddle slipping.[25]

Although there has been little discussion of these sections in the case law, where the 'risk-warning' defence has been raised, the courts have interpreted the defence narrowly. In *Vreman v Albury City Council*,[26] a sign setting out conditions as to the use of a skate park including the need to wear safety gear and the statement 'skate at your own risk', did not amount to a risk warning about the specific risks that might be encountered, particularly of serious injury.

THE ACL STATUTORY GUARANTEES

A person who is a consumer and who is negligently injured in the course of recreational activities may sue the defendant suppliers of such services for failure to comply with one of the statutory guarantees contained in the ACL (alongside claims either in the tort of negligence, or for breach of contract). One of the advantages of the ACL is that it requires all service-providers, *whether corporate or otherwise*, in all states and territories, to supply services to consumers in trade or commerce in accordance with the statutory guarantees. Under the previous *Trade Practices Act* (TPA), the implied term that services were to be performed with due care and skill was not contained in all states' Fair Trading Acts (FTAs).[27]

Section 60 of the ACL provides: 'If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.'

Importantly, since s60 creates a statutory guarantee, plaintiffs can seek damages for failure to comply with the guarantee under s267, ACL, which specifically deals with services. If the failure to provide services with due care and skill leads to foreseeable personal injury (s13) or property damage, then compensation for such personal injury is available under s267 as reasonably foreseeable 'loss or damage'. If an instructor fails properly to instruct the client on the appropriate use of safety gear so that the client falls from a climbing wall, a potential claim for damages under s267 for breach of s60 would run. An example from the previous TPA, *Renehan v Leeuwin Ocean Adventure Foundation Ltd*, illustrates the point.[28] In that case, the plaintiff participated in training activities on an adventure sail training ship, the *Leeuwin*, owned by the defendant. She suffered injury when she fell off the main mast. It was held that the owner of the ship had failed to supply the services with due care and skill, in not having a system in place to ensure that the plaintiff's belt was properly secured.

An important question arises in relation to a claim for breach of s60 and damages under s267. Despite the promise of greater uniformity as a result of the ACL, ongoing differences between the CLAs of the states and territories, and the interaction of the CLAs with the ACL, lead to unnecessary complexity in this field. Do the CLAs apply in relation to establishing the legal requirements for liability and the applicable defences, and in determining the applicable principles for calculating damages? The answer appears to be 'yes'. This is because proof of a breach of s60 requires the consumer plaintiff to show that the defendant service-supplier acted without due care. Therefore, the CLAs on their face seemingly apply, even to statutory claims. All the CLAs set out general principles applying to claims arising *from a failure to take reasonable care*, irrespective of whether such claims are brought in tort, contract *or under statute*. Claims under statute will therefore be governed by the relevant state CLA. Importantly, it appears that s275 ACL allows the continued operation of the state and territory CLAs that apply to the careless supply of services. Section 275 states that state or territory laws that apply 'to limit or preclude' liability for a failure to comply with a term of a contract or a statutory guarantee continue to apply. The section is very complex. To simplify, the section makes the CLAs applicable to statutory claims under the ACL.[29] The likely effect of s275 ACL is that the various CLAs that *directly* limit or preclude liability for careless conduct, including breaches of the statutory guarantee of due care and skill, will be valid.[30]

This means, given the variation across the CLAs in different jurisdictions, that there is no uniformity in the determination of precisely the circumstance in which liability arises as a result of s60, in relation to personal injury (or for that matter, property damage). As a result of s275, it is therefore likely that individual state provisions that restrict liability continue to operate in each jurisdiction. These would apply equally to *corporate* suppliers. Specific >>

defences adopted in some jurisdictions, such as those dealing with 'obvious risks' and dangerous recreational activities, operate only via s275. To take an example: where a consumer of a supplier of services is injured while engaged in dangerous recreational activities, the supplier can plead such defence and potentially defend such a claim in NSW, even where such supplier was negligent; whereas in Victoria, it cannot.

The important question of the effectiveness of an attempted exclusion of liability is determined by the vagaries of contract law. This is not necessarily satisfactory.

EXCLUSION OF LIABILITY

The statutory guarantees cannot *generally* be excluded as a result of s64, ACL:

'Guarantees not to be excluded, etc., by contract:

(1) A term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) is void to the extent that the term purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying:

(a) the application of all or any of the provisions of this Division; or

(b) the exercise of a right conferred by such a provision; or

(c) any liability of a person for a failure to comply with a guarantee that applies under this Division to a supply of goods or services. ...'

In theory, this should mean that where a plaintiff brings a claim for damages against a supplier of services generally, as distinct from a defendant who is not a *supplier* of sevices, such defendant cannot exclude liability under its contract for breach of the consumer guarantees. Consequently, any such exclusion would also be void in relation to any claim in the tort of negligence. Critically, however, it is possible under the *Competition and Consumer Act* 2010 (Cth) ('CCA') to exclude the guarantees in relation to services in one context of particular relevance to this article, namely recreational services.

Section 139A, CCA allows for the exclusion of the statutory guarantees in relation to services contained in the ACL; in particular, ss60 and 61. Such a term is not void under s64, ACL to the extent that it 'excludes, restricts or modifies' such a statutory guarantee (s139A(1)), so long as such exclusion is limited to liability for death or physical or mental injury. Injury includes the acceleration or aggravation of injury or a disease (subsection (3)). The term 'recreational services' is broadly defined in subsection (2). Importantly, subsection (4) contains an important limitation: 'This section does not apply if the exclusion, restriction or modification would apply to significant personal injury suffered by a person that is caused by the reckless conduct of the supplier of the recreational services.' Recklessness is defined in subsection (5) as follows:

'The supplier's conduct is *reckless conduct* if the supplier:

(a) is aware, or should reasonably have been aware, of a significant risk that the conduct could result in personal injury to another person; and

(b) engages in the conduct despite the risk and without adequate justification.'

If an exclusion clause *effectively* excludes liability for conduct contravening s60, it will almost certainly also exclude liability for any negligence claims in *tort*; that is, for breach of a duty of care, as between the parties to the contract. If an exclusion clause is not effective in excluding liability for contravention of s60, either because it has not been validly incorporated into a contract or its meaning does not extend to exclude liability in the particular circumstance in which the accident eventuated,[31] then a claim for damages for losses arising from contravention of s60 will be available against a defendant service-provider.

It should be noted, however, that s139A CCA does not set out how an exclusion clause is to be effectively worded and incorporated into a service contract. Hence, the common law principles of contract apply as to the incorporation of terms and their interpretation. This means that the important question of the effectiveness of an attempted exclusion of liability is determined by the vagaries of contract law. This is not necessarily satisfactory, a position at least partly recognised in Victoria, where the exclusion provision is more prescriptive as to the steps that a service-provider needs to take before an exclusion clause is effective. Specifically, such an exclusion must be in the prescribed form set out in the Schedules to the *Fair Trading (Recreational Services) Regulations* 2004 (Vic) and must have been brought to the attention of the consumer (s32N(2), FTA (Vic)).

Finally, adding to the complexity, s139A, CCA introduces a new distinction, namely between ordinary negligence, which can be excluded, and 'recklessness', which cannot. Obviously, this restriction on the excludability of the s60 guarantee has merit, in that it precludes the most serious carelessness from going unremedied; but it adds a new complication to the law. Although a definition of recklessness is given in the statute, this does not overcome the problems created when *degrees* of negligence are introduced. Therefore, if a consumer suffers loss through a supplier's carelessness, a further issue that then needs to be considered is whether the conduct was 'reckless' within the definition of s139A. If the supplier was 'reckless', then the exclusion of liability will not operate; if the supplier *was careless*, but *not reckless*, then the exclusion clause may operate to exclude liability.

CONCLUSION

There are many further issues that could have been addressed in this article, such as the differences between s139A CCA and state legislation that also allow for the exclusion of liability of service guarantees (s32N FTA (Vic)) and whether such provisions are inconsistent. Even without such further complications, it is evident that the law governing plaintiffs seeking redress for negligence as a result of engaging in recreational activities is no longer a simple matter of asking: was the injury the result of any carelessness, and on whose part? Instead, we now need to consider factors such as whether the defendant being sued was a supplier of the activity under a contract of services; whether there was an attempt to exclude liability under contract; whether the defendant's carelessness was reckless or not; and so on. And further, the state or territory in which the activity took place becomes all the more critical in determining the likelihood of a successful claim. ■

Notes: **1** See, for example, National Health Survey 2001 data, at http://www.abs.gov.au/ausstats/abs@.nsf/mf/4384.0 (accessed 16 December 2012); and see also McHugh J in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; 186 ALR 145 at [62]. **2** CLA (NSW) s5H, CLA (Qld) s15, CLA (SA) s38, CLA (Tas) s17, and CLA (WA) s5O. **3** For example, *Chotiputhsilpa v Waterhouse* [2005] NSWCA 295 at [61], [76]. **4** CLA (NSW) s5F, CLA (Qld) s13, CLA (Tas) s15, CLA (WA) s5F. **5** *Jaber v Rockdale City Council* (2008) Aust Tort Reps 81-952 at 61,707; [2008] NSWCA 98, [35] (Tobias JA). **6** *Carey v Lake Macquarie City Council* (2007) Aust Tort Reps 81-874, 69,235; [2007] NSWCA 4, [97] (McLellan CJ at CL). **7** [2005] NSWCA 151. **8** For example, *Jaber v Rockdale City Council*, above note 5. **9** *Pollard v Trude* [2009] 2 Qd R 248; [2008] QCA 421. **10** (2002) 208 CLR 460; [2002] HCA 9. **11** *Ibid*, for example, 471-2, [34]-[36] per Gleeson CJ and 503-4, [144] per Hayne J. In dissent, McHugh and Kirby JJ (at [80] and [126]-[131]) instead focused on the enhanced risk of serious eye injury posed by the softness and size of the ball used, such as would allow it to penetrate the eye socket, which was not obvious. **12** *C G Maloney Pty Ltd v Hutton-Potts* [2006] NSWCA 136, [174] (Bryson JA, McColl JA agreeing). **13** Compare *Mikronis v Adams* [2004] 1 DCLR (NSW) 369. **14** CLA (Vic) s53, is identical to the CLA (Qld) provision, but without the examples attached to subsection (5) in the CLA (Qld). **15** CLA (NSW) s 5L, CLA (Qld) s19, CLA (Tas) s20, CLA (WA) s5H. **16** *Falvo v Australian Oztag Sports Association* (2006) Aust Torts Reps 81-831; [2006] NSWCA 17, [28]-[30] (Ipp JA, Hunt AJA and Adams J agreeing). See also *Jaber v Rockdale City Council* (2008) Aust Tort Reps 81-952; [2008] NSWCA 98, [46]-[55] (Tobias JA; Campbell JA and Handley AJA agreeing). **17** *Fallas v Mourlas* (2006) 65 NSWLR 418, 422; [2006] NSWCA 32, [18] per Ipp JA; see also Tobias JA at 432, [90]. See also *Jaber v Rockdale City Council* (2008) Aust Tort Reps 81-952, 61,709-61,711; [2008] NSWCA 98, [46]-[55]. **18** *Jaber v Rockdale City Council* (2008) Aust Tort Reps 81-952; [2008] NSWCA 98. **19** *Fallas v Mourlas* (2006) 65 NSWLR 418; [2006] NSWCA 32. **20** *Vreman and Morris v Albury City Council* [2011] NSWSC 39. **21** *Falvo v Australian Oztag Sports Association* (2006) Aust Torts Reps 81-831; [2006] NSWCA 17. **22** *Lormine Pty Ltd v Xuereb* [2006] NSWCA 200. **23** *Laoulach v Ibrahim* [2011] NSWCA 402, [121], and [122]-[124], Tobias AJA (Giles and Macfarlan JA agreeing). **24** *Smith v Perese* [2006] NSWSC 288, [86]. **25** *Mikronis v Adams* [2004] 1 DCLR (NSW) 269. **26** [2011] NSWSC 39, [107]-[114] per Harrison J. **27** In Queensland and Tasmania, where a person was injured by a non-corporate supplier, such suppliers may still have been subject to contract law implied terms of due care and skill, but a contract could exclude such implied terms or exclude or limit liability for breach of such terms. **28** (2006) 17 NTLR 83; [2006] NTSC 4. **29** See, generally, J Dietrich, 'Service guarantees and consequential loss under the ACL: The illusion of uniformity' (2012) 20 *Competition and Consumer Law Journal* 43. **30** See the High Court decision of *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149; [2011] HCA 16 (11 May 2011), dealing with a previous version of s275 ACL under the TPA (s74(2A)) which was worded almost identically. **31** See, for example, *John Dorahy's Fitness Centre Pty Ltd v Buchanan* (unreported CA(NSW) 18 December 1996, No. 40386/94, BC9606183); *Lormine Pty Ltd v Xuereb* [2006] NSWCA 200; *Belna Pty Ltd v Irwin* [2009] NSWCA 46.

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