ADDRESS TO
LEXISNEXIS PROFESSIONAL DEVELOPMENT CONFERENCE

PERSONAL INJURY IN QUEENSLAND

HILTON HOTEL, 26 APRIL 2006

DANGEROUS LIAISONS

WITH THE *CIVIL LIABILITY* ACT 2003 (QLD)

by the Hon Justice Margaret McMurdo*

The organizers have asked me to examine the ramifications of the *Civil Liability Act* 2003 (Qld) ("the Qld CLA") for claims for injuries arising out of "dangerous recreational activities" with particular reference to the following areas:

- Which activities come under the umbrella "dangerous"?
- What kind of risk will be taken to have been assumed by a claimant and what principles may be gleaned from cases before and after the coming into force of the Qld CLA?
- The extent to which the common law has been changed by the Qld CLA
- Are children particularly vulnerable?
- How do the provisions of the Act relate and compare to s 68B *Trade Practices Act* 1974 (Cth) and reforms in other jurisdictions?
- The future of waivers of liability and their impact on personal injury claims.

You will immediately appreciate that this is a dauntingly wide variety of areas to cover in a 45 minute address, but in the great Australian sporting tradition, this mug will have a go! In doing so I propose first to discuss the position under the general law before the Qld CLA came into force. Second, I will briefly analyse the pertinent provisions of the Qld CLA. Third, I will discuss recent Australian case law developments since the Qld CLA came into force. Fourth, I will make some brief comparisons between the position under the Qld CLA and that in some other jurisdictions and consider the effect of s 68B *Trade Practices Act* 1974 (Cth) ("TPA") with particular reference to the position of children, especially in Queensland.

The position under the general law before the Qld CLA

In the 70 years following the demise of the snail in the opaque ginger beer bottle and Lord Atkin's seminal statement "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour",[1] the law of the tort of negligence has incrementally developed and gradually widened in its scope.

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1 *Donoghue v Stevenson* [1932] AC 562, 580.

At common law, in deciding whether a defendant has breached the duty to a plaintiff to take reasonable care, a court must decide whether a reasonable person in the defendant's position would have foreseen that the defendant's conduct might pose a risk of injury to the plaintiff or to a class of persons including the plaintiff and, if so, what the reasonable person would have done by way of response to the reasonably foreseeable risk of injury: *Council of the Shire of Wyong v Shirt*.[2]

At common law a risk of injury is reasonably foreseeable if it is not far-fetched and fanciful,[3] a question of fact to be judged in the light of all the circumstances prevailing at the time. A plaintiff must show that a reasonable person in the defendant's position would have taken reasonable precautions against a reasonably foreseeable risk of injury. In determining that matter a court considers factors including the likelihood of the risk occurring; the magnitude of the risk and the seriousness of the harm the plaintiff would suffer; the expense, difficulty and inconvenience of taking the precautions and the social utility of the defendant's conduct.[4] The need to take precautions increases with the likelihood that the defendant's conduct will cause harm.[5] A high degree of care will be necessary when the harm is inherently likely.[6] The obviousness of a risk is a factor in determining the standard of care but is not in itself conclusive.[7] Whether a risk is obvious is a question of fact.[8]

A child must live up to the standard of care of the reasonable child of his or her own age and experience: *McHale v Watson*.[9]

The common law also recognizes the maxim *volenti non fit injuria*, that a plaintiff may voluntarily accept the risk involved in an activity so that a defendant is not liable in negligence. No inference of voluntary assumption of risk automatically arises from participation in an arguably dangerous sport.

In *Rootes v Shelton*[10] (1967), the High Court noted that plaintiffs engaging in a sport or pastime may be held to have accepted inherent risks but that does not eliminate all of a defendant's duty of care; whether or not a duty arises and its extent will depend on the circumstances in each case. In that case the defendant sought to meet the plaintiff's claim of negligence as to his manner of control of a speedboat whilst towing the plaintiff water skier by contending that the plaintiff had voluntarily assumed the risk which eventuated. Judges have consistently distinguished between adults participating voluntarily in amateur sport and children playing compulsory sport at school: see, for example Gleeson CJ's observations in *Agar v Hyde*[11] and in *Woods v Multi-Sport Holdings Pty Ltd*.[12]

In *Nagle v Rottnest Island Authority*[13] (1993), Mr Nagle was injured when he dived into water at a reserve, managed by the defendant, which was promoted for swimming and related

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2 (1980) 146 CLR 40, Mason J 47 - 48.
3 Above.
4 Above.
5 *Swinton v The China Mutual Steam Navigation Co Ltd* (1951) 83 CLR 553, 566 - 567.
6 *Hampton Court Ltd v Crooks* (1957) 97 CLR 367.
7 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, Gleeson CJ [45], Kirby J [127] - [128].
8 *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431.
9 (1966) 115 CLR 199, 205.
10 (1967) 116 CLR 383, 386 - 387.
11 (2000) 201 CLR 552, 561.
12 (2002) 208 CLR 460, 472 - 473.
13 (1993) 177 CLR 423.

recreational purposes. He brought an action against the defendant claiming that it breached its duty to him in not providing visitors with warning signs of the presence of submerged rocks. The High Court majority, consisting of Mason CJ, Deane, Dawson and Gaudron JJ (Brennan J dissenting), found that Mr Nagle's injuries were caused by the defendant's failure to warn of the presence of submerged rocks, in breach of its duty of care to him. The risk of injury to him was reasonably foreseeable even though diving at the site may have been foolhardy or unlikely. An appropriate warning sign would probably have deterred Mr Nagle from diving.

A rather differently constituted High Court in *Romeo v Conservation Commission (NT)*[14] (1998), with only Brennan (now CJ) and Gaudron J also sitting in *Nagle*, considered whether Ms Romeo, who suffered serious injuries when she fell 6.5 metres from the top of a cliff on to a beach in a nature reserve managed by the defendant, was owed a duty of care. There was a car park about three metres from the edge of the cliff with a low log fence around its perimeter and low vegetation between the fence and the cliff edge. Ms Romeo fell at night, whilst intoxicated, at a point where there was a gap in the vegetation. There was no fence or barrier at the cliff edge. The cliff, which was about two kilometres long, was obvious and the area was one of natural scenic beauty.

Toohey, Gaudron, McHugh, Gummow, Kirby and Hayne JJ all found that the defendant was under a duty to those entering the reserve to take reasonable care to avoid reasonably foreseeable risks of injury and that the risk of someone falling off the cliff was reasonably foreseeable. Toohey, Gummow, Kirby and Hayne JJ further found that the defendant was not in breach of its duty of care by failing to erect a fence or other barrier at the edge of the cliff. Gaudron and McHugh JJ dissented and would have allowed the appeal.

Toohey and Gummow JJ in a joint judgment and Brennan CJ in separate reasons considered that, whilst the defendant was under a general duty of care to take reasonable steps to prevent persons entering the reserve from suffering injury, it did not breach that duty by failing to erect a barrier in an area of natural beauty where the presence of the cliff was obvious.[15] Kirby J considered that where a risk is obvious to a person exercising reasonable care for his or her own safety, it is not necessary for an occupier to warn an entrant about that risk.[16] He applied Mason J's seminal test in *Wyong*[17] and found that no breach on the part of the defendant had been demonstrated; the case could be distinguished from *Nagle* where there was a danger from hidden submerged rocks whilst here the elevation of the cliffs was perfectly obvious to any reasonable person. Hayne J considered that in finding the defendant owed visitors a duty to take reasonable care to avoid foreseeable risks of injury to them, what is reasonable must be judged in the light of all the circumstances and according to the prevailing standards of the day.[18] The factual conclusions of the primary court as to the risk of injury to an inattentive intoxicated young woman were open: Ms Romeo failed to demonstrate that the defendant in the exercise of reasonable care should have fenced the area to prevent her falling and suffering her serious injuries.[19]

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14 (1998) 192 CLR 431.

15 Above, 456.

16 Above, 454.

17 *Wyong*, above, 47 - 48: in determining what was a reasonable response consideration should be given to "… the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have".

18 *Romeo*, above, 489.

19 Above, 492.

In *Agar v Hyde*[20] (2000), Mr Hyde and Mr Worsley brought proceedings against individual members of the International Rugby Football Board after they suffered spinal injuries during rugby union games in New South Wales. They alleged that the rules relating to the formation of scrums exposed them to unnecessary risk of physical injury and that each member of the Board owed them a duty to take reasonable care in monitoring the operation of the rules to ensure that they did not provide for circumstances where risks of serious injury were taken unnecessarily. Mr Hyde and Mr Worsley applied for orders granting them leave to proceed against Board members who had been served outside Australia and for orders extending the limitation period against them. Grove J dismissed their applications but the Court of Appeal allowed both appeals and gave leave to proceed. The defendants appealed to the High Court.

Gleeson CJ referred to Lord Macmillan's statement in *Donoghue v Stevenson*:

> "In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life."

Gleeson CJ continued:

> "I am unable to accept that the circumstances of life in this community are such that the conception of legal responsibility should be applied to the relation which existed between the appellants and all people who played the game of rugby football and were, on that account, affected by their action or inaction in relation to the rules of the game. Undertaking the function of participating in a process of making and altering the rules according to which adult people, for their own enjoyment, may choose to engage in a hazardous sporting contest, does not, of itself, carry with it potential legal liability for injury sustained in such a contest."[21]

All members of the court (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) agreed that Grove J was right to dismiss the applications and that the New South Wales Court of Appeal wrongly allowed the appeals. Gaudron, McHugh, Gummow and Hayne JJ in a joint judgment agreed that it was not even arguable that the defendants owed either Mr Hyde or Mr Worsley a duty of care. To hold that each of the individual defendants owed a duty of care to each person who played rugby under those laws bordered on the absurd.[22] Their Honours noted that the plaintiffs were freely consenting adult participants in a game which they chose to play and which had an obvious element of danger which, for many, added to its attraction. To hold that the defendants owed a duty of care would diminish the autonomy of those who chose for whatever reason to engage in this or any other physically dangerous

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20 (2000) 201 CLR 552.

21 Above, 564.

22 Above, 578.

pastime.[23] Their Honours noted however that separate questions may arise about school age children whose decisions are made or affected by others.[24]

Callinan J, an erstwhile enthusiastic rugby union player, noted that in respect of the duty of care "[s]port, particularly amateur sport, stands in an entirely different position from the workplace, the roads, the marketplace, and other areas into which people must venture. When adults voluntarily participate in sport they may be assumed to know the rules and to have an appreciation of the risks of the game. In practically every sport safer rules could be adopted". In determining that no duty existed, his Honour referred to factors including that Hyde and Worsley were voluntarily engaged in the amateur sport of rugby union, a notoriously dangerous game.[25]

In 2002, when the High Court gave its decision in *Woods v Multi-Sport Holdings Pty Ltd*,[26] the so-called "insurance crisis" was centre stage in the public arena. Mr Woods was hit in the eye by a ball when batting in a game of indoor cricket and was seriously injured. He sued the owner/operator of the indoor cricket centre. The defendant accepted it owed a duty to take reasonable steps to avoid the risk of injury to players arising from the dangers involved in playing indoor cricket. Mr Woods contended that the defendant breached that duty in failing to warn him or to display signs warning of the dangers of the game, in particular the risk of serious eye injury, and in failing to provide him with eye protection equipment.

Indoor cricket, which is played in a confined space under rules set by a national association, has no helmets designed specifically for the game and the normal practice is not to wear helmets. Indeed, the rules only allow the umpire to permit them to be worn when a player has a special medical condition. The primary judge found that the defendant's duty of care did not require it to provide Mr Woods with a helmet to protect him against the risk of injury to his eyes and that the risk of a player being struck was so obvious that reasonableness did not require the defendant to warn players about the specific risk of eye injury. The Full Court of the Supreme Court dismissed the plaintiff's appeal. The High Court was closely divided in a 3-2 decision with Gleeson CJ, Hayne J and Callinan J (also an erstwhile enthusiastic cricketer) dismissing the appeal, McHugh and Kirby JJ dissenting. The majority considered the primary judge was entitled to reach his conclusions on the duty of care and reasonableness. McHugh and Callinan JJ referred to statistical evidence as to the prevalence of injuries due to sport or recreational activities.

Kylie Burns in *It's Just Not Cricket: The High Court, Sport and Legislative Facts*[27] suggests that *Agar* and *Woods* demonstrate a recent trend in negligence cases in the High Court away from the values of paternalism, loss-distribution and communal responsibility towards autonomy, self-responsibility and risk choice. She notes that "[c]learly, sport, risk choice and autonomy are intrinsically linked and endorsed" in these decisions.[28] Such a sweeping observation is not consistent, however, with the High Court's subsequent approach in *Thompson v Woolworths (Qld) Pty Ltd*[29] and *Swain v Waverley Municipal Council*.[30]

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23 Above, 583.
24 Above, 584.
25 Above, 600 - 601.
26 (2002) 208 CLR 460.
27 (2002) 10 *Torts Law Journal* 1.
28 Above, 12.
29 (2005) 79 ALJR 904.
30 (2005) 220 CLR 517.

Although *Swain* was decided at High Court level in 2005 after the Qld CLA came into operation, it was determined on common law principles. The decision throws doubt on Ms Burns' hypothesis. The High Court overturned the New South Wales Court of Appeal's decision and reinstated the jury verdict that injuries sustained whilst Mr Swain was body surfing between flags erected by the defendant when he waded some distance into the sea, attempted to dive through a wave and struck his head on a sandbar, were caused by the defendant's failure to take reasonable care in positioning the flags or failing to warn swimmers of the sandbar.

The appeal was allowed in another majority decision (Gleeson CJ, Gummow and Kirby JJ, McHugh and Heydon JJ dissenting). The majority considered that the Court of Appeal was wrong to overturn the jury's findings which were open on the evidence. Gummow J observed that even if Mr Swain was foolhardy in assuming that the flags indicated it was safe to dive, as distinct from swim, between the flags, it was open to the jury to conclude that in placing the flags the defendant should have exercised reasonable care to prevent injury to persons who misunderstood what the flags represented. His Honour considered that whether or not a risk is obvious is a question of fact and that the results of cases in this area of law are inevitably very fact-sensitive. It was open to the jury to infer from the evidence that the channel and sandbar were unexpected and concealed hazards. The defendant had not met its evidentiary onus to lead evidence that no reasonably practicable alternative course of conduct was open to it.[31]

The relevant provisions of the Qld CLA

The Qld CLA, s 68B TPA and like provisions in other jurisdictions (*Civil Liability Act* 2002 (NSW) Part 1A; *Civil Liability Act* 1936 (SA) Part 6; *Civil Liability Act* 2002 (Tas) Part 6; *Wrongs Act* 1958 (Vic) Part X and *Civil Liability Act* 2002 (WA) Part 1A)) arose as a legislative response to the *Review of the Law of Negligence Final Report*, September 2002 ("the Ipp Report"). Of particular relevance to the issues covered in this paper are recommendations 11, 12, 13, 14, 29 and 32. The review resulting in the Ipp Report was a response to public controversy, fanned by the media and the insurance lobby, over awards to plaintiffs in personal injuries cases including some where injuries had been suffered whilst participating in recreational activities. Rising insurance premiums, especially in industries primarily involved in outdoor sports and recreation, caused operators of recreational businesses to call for restrictions on their liability. Some members of the public appeared to agree with the claim that participants in such activities should take responsibility for their own actions and consequent injuries. Queensland's legislative response includes the Qld CLA.

In the Second Reading Speech of the Bill which became the Qld CLA, the then Attorney-General, the Honourable R J Welford, noted that duties and entitlements under the common law remain intact unless specifically excluded or modified by the Bill.[32] The Attorney also noted that it modified the law relating to the duty to warn others of obvious risks, confirming that no person has a duty to warn another of an obvious risk unless specifically asked to provide information on the risk, and that a person will not be liable for injury to another as the result of an obvious risk in a dangerous recreational activity. The Attorney described the Bill as "a comprehensive response to the problems raised by the insurance crisis. It affects

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31 Above, 592 - 595.

32 *Hansard*, 11 March 2003, 367.

every area of the law of negligence and puts some commonsense and personal responsibility back into the law. If the insurance industry behaves honestly and accountably, they will respond positively to this legislation. Finally, if the federal government cares about the welfare of the sporting, recreational and cultural communities and professional organizations who are suffering under crippling insurance premium increases, they will give the ACCC the power to bring the insurance industry into line and hold it accountable for the changes that our government and others are making around the country".[33]

In understanding the provisions of the Qld CLA with which this paper is directly concerned, it is a useful commencing point to briefly examine the scheme of the Act and the context in which those provisions are found. The Qld CLA is presently in reprint No 1G. It was recently described to me in the Court of Appeal by a leading Senior Counsel in the personal injuries field as "a monstrosity".

If I may adapt the words of the consummate bureaucrat, Sir Humphrey Appleby of *Yes Minister* fame: "Senior Counsel may well say that, but I could not possibly comment!".

The Act contains five chapters and, consistent with popular drafting fashion, the definitions are contained in a dictionary in a schedule to the Act, here Schedule 2. Curiously, in the latest reprint there is no longer any Schedule 1! The first chapter deals with preliminary matters and contains three parts, an Introduction, Application of Act, and Interpretation. For the purposes of the topics covered in this paper, the Qld CLA applies to all civil claims for damages for harm happening on or after 2 December 2002 (s 4).

"Harm" is defined as harm of any kind including personal injury; damage to property; and economic loss. The Qld CLA appears not, therefore, to be limited to claims in negligence but applies to *any* civil claim for damages for harm as defined. The Qld CLA binds all persons including the State (s 6). It does not create a statutory right of action for damages (s 7(1)). It does not generally prevent parties to a contract from making express provisions for their rights, obligations and liabilities under the contract (s 7(3)). The Act is not a code (s 7(5)) so the common law, unless plainly modified, continues. The Act does not apply to most workplace personal injuries, personal injuries that are dust-related conditions, nor those resulting from smoking or the use of tobacco products or exposure to tobacco smoke (s 5)).

Chapter 2 of the Act is headed "Civil liability for harm". Part 1 (Breach of duty) has seven divisions, Division 1 of which deals with the general standard of care. A person does not breach a duty to take precautions against a risk of harm unless the risk was foreseeable, not insignificant and in the circumstances a reasonable person would have taken the precautions. (s 9(1)). Duty is defined as a duty of care in tort or under contract that is concurrent and coextensive with a duty of care in tort or another duty under statute or otherwise that is concurrent with such a duty. This suggests that, subject to s 5, the legislature intended that the Qld CLA apply to claims of breach of contract of a duty to take reasonable care and to any statutory duties or contractual duties implied by contract under consumer protection legislation such as the TPA or the *Fair Trading Act* 1989 (Qld). It is arguable that s 9 is intended to modify the common law requirement stated in *Wyong* that a risk may be foreseeable if it is not far-fetched or fanciful. In determining whether precautions should have been taken against a risk of harm, a court is to consider, among other relevant things, the probability that the harm would occur if care were not taken, the likely seriousness of the

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[33] Above, 369.

harm, the burden of taking precautions to avoid the risk of harm and the social utility of the activity that creates the risk of harm (s 9(2)). Other principles are set out in s 10 of the Act which appear to restate rather than modify the common law set out in *Wyong*.

Division 2 of Part 1 of Chapter 2 deals with causation which contains two elements: first, the breach of duty must be a necessary condition of the occurrence of harm (factual causation) and second, it must be appropriate for the scope of the liability of the person in breach to extend to the harm so caused (scope of liability): s 11(1).[34] In deciding liability for breach of duty, the onus is on the plaintiff on the balance of probabilities to prove any fact relevant to the issue of causation (s 12).

Division 3 of Part 1 of Chapter 2 is headed "Assumption of risk". It defines, for the purposes of that Division, the term "obvious risk" as a risk that, in the circumstances, would have been obvious to a reasonable person *in the position of that person* (my emphasis) and includes risks that are patent or matters of common knowledge (s 13(2)). The words I have emphasized suggest that where a child is injured the question for a court will be, as at common law, what would have been obvious to a reasonable child of the age of and in the position of the plaintiff. An obvious risk can have a low probability of occurring (s 13(3)) and may not be prominent, conspicuous or physically observable (s 13(4)). An obvious risk from a thing, including a living thing, is not one created by 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 (s 13(5)). The Act gives the following examples for s 13(5):

> "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.
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> 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."

If the defence of voluntary assumption of risk is raised by the defendant in an action and the risk is an obvious risk, the plaintiff is taken to have been aware of the risk unless the plaintiff proves on the balance of probabilities that he or she was not aware of the risk (s 14). This reverses the onus of proof at common law.

There is no duty to warn of an obvious risk (s 15(1)) but that may change if the plaintiff has requested advice or information about the risk from the defendant, the defendant is required by a written law to warn the plaintiff of the risk, or the defendant is a professional (other than a doctor) and the risk is a risk of death or personal injury to the plaintiff from the provision of a professional service by the defendant (s 15(2)). Those provisions do not give rise to a presumption of a duty to warn of a risk in those circumstances (s 15(3)). Section 15 may be applied to remove a contractual duty to take reasonable care coexistent with a tortious duty unless the contract excludes the operation of the Qld CLA. Section 15 does not appear to affect a duty to warn arising as a result of the defective goods provisions in Part VA TPA.

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[34] See also s 11(2) - (4).

The Qld CLA distinguishes between obvious risks (s 13 - s 15) and inherent risks (s 16). A defendant is not liable for harm suffered by a plaintiff as a result of the materialization of an inherent risk, that is, a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill (s 16(1) and (2)) but s 16 does not operate to exclude liability in connection with a duty to warn of a risk (s 16(3)). It does not appear to effectively change the common law.

Division 4 of Part 1 of Chapter 2 contains the provisions of the Act relating to dangerous recreational activities. Division 4, unlike the earlier divisions, applies only to liability in negligence (s 17(1)). It does not seem to apply to claims in contract, breaches of statutory duty or under consumer protection legislation such as the TPA. For the purposes of this Division "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. An "obvious risk" has the same meaning as set out earlier in the discussion of Division 3 (s 18).

The words contained in the definition of "dangerous recreational activity", other than "harm" with which I have already dealt, are not further defined in the Qld CLA. I trust that, even after your many years of hard work in this tough profession, the words "enjoyment", "relaxation" and "leisure" do not need further explanation! They have their ordinary meaning. The use of the disjunctive "or" suggests it may be sufficient to come within the definition in s 18 if the activity is for either enjoyment or recreation or leisure. An issue that may arise is whether it is sufficient if the activity is engaged in only partially for one of those reasons or whether it is necessary that the activity be engaged in primarily or even solely for those purposes or at least one of them. After all, many of us enjoy, and even perhaps are relaxed, performing activities which are not leisure activities, for example, attending a seminar such as this, or, dare I suggest, appearing in the Court of Appeal! Perhaps that dilemma will usually be solved by the second requirement of the definition in s 18 that the activity must also involve a significant degree of risk of physical harm to a person. Surely a risk of physical harm whilst attending a seminar such as this and certainly when appearing in the Court of Appeal would be far-fetched or fanciful!! The Macquarie Dictionary's primary definition of "significant" is "important; of consequence". According to the Ipp Report, a significant degree of risk of physical harm suggests a higher degree of probability than that necessary to establish a breach of duty at common law.

Division 4 applies only to dangerous recreational activity engaged in by a plaintiff and does not limit the operation of s 13 in Division 3 in relation to general recreational activity (s 17(2)). A defendant will not be liable in negligence for harm suffered by a plaintiff resulting from the materialization of an obvious risk of a dangerous recreational activity engaged in by the plaintiff (s 19(1)), whether or not the person suffering harm was aware of the risk (s 19(2)). Section 19 provides a defendant with a blanket protection (cf s 15(2)). Although it applies whether or not a person injured was aware of the obvious risk (s 19(2)), an obvious risk remains as defined in s 13, one that would have been obvious to a reasonable person *in the position of that person*. It seems that it is unnecessary to prove the plaintiff accepted the risk for a defendant to benefit from s 19.

The protection to a defendant afforded by s 19 Qld CLA may well prove to be broader than at common law, where no inference of voluntary assumption of risk arises merely from participation in recreational activities which could be dangerous: *Rootes v Shelton*.[35]

The Explanatory Notes to the Qld CLA observe that because it does not codify the law relating to civil claims for damages (s 7) the development of the law of negligence in areas not qualified by the Qld CLA can continue. In respect of Division 4 and in particular s 18 they observe, consistent with the pertinent recommendation of the Ipp Report, that any consideration of a significant degree of risk of physical harm necessarily requires consideration of factors including but not limited to the type of activity, the probability of harm occurring, the severity of the injury *and the characteristics of the person who suffered injury* (my emphasis).

Whether a particular activity is a dangerous recreational activity as defined in s 18 and whether a defendant will escape liability in negligence under s 19 will depend on a court's application of those provisions to the particular established factual circumstances of each case.

Division 5 of Chapter 2 deals with the duty of professionals; Division 6 with contributory negligence and Division 7 with the enhancement of public safety. Part 2 of Chapter 2 deals with proportionate liability and Part 3 with the liability of public and other authorities and volunteers respectively in its Division 1 and Division 2. Part 4 excludes categories of people from claiming damages because of particular behaviour, namely criminal behaviour (Division 1) and intoxication (Division 2) and Part 5 deals with awards for economic loss following failed sterilization procedures (the *Cattanach v Melchior*[36] exclusion) or failed contraceptive procedures or advice.

What are arguably the most important changes to the common law as a result of the Qld CLA are contained in Chapter 3 and its provisions relating to the assessment of damages for personal injuries. Part 1 deals with preliminary matters; Part 2 excludes the awarding of exemplary, punitive or aggravated damages; Part 3 provides significant limitations on the assessment of damages and Part 4 allows for structured settlements.

Chapter 4 of the Act deals with miscellaneous provisions including expressions of regret, the exclusion of jury trials and provides a regulation-making power. Chapter 5 contains the transitional provisions.

How did that Senior Counsel describe the Qld CLA?

Recent cases determined since the Qld CLA

It is useful to consider next recent cases determined by the courts in Australian jurisdictions since the enactment of the Qld CLA or like provisions.

My research has not found any Queensland cases considering Division 4 of Part 1 of Chapter 2 of the Qld CLA. The only case presently considering Division 3 seems to be *Amos v Brisbane City Council*[37] where the serial litigant, Mr Amos, tripped over a water valve and a

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35 (1967) 116 CLR 383, 386 - 387.

36 (2003) 215 CLR 1.

37 Unreported, Magistrates Court (Qld), No 13693 of 2003; Mr Amos applied for leave to appeal to the District Court and the Court of Appeal on an unrelated costs issue: [2005] QCA 433.

hydrant adjoining a footpath. The valve and hydrant were clearly visible in the daylight. Cassidy M considered that the risk was obvious within s 13 Qld CLA and also at common law. The decision appears unremarkable and is as consistent with the common law as with the provisions of the Qld CLA.

In *Mikronis v Adams*[38] (2004), Dodd DCJ was critical of the comparable but not identical provisions of the *Civil Liability Act* 2002 (NSW) ("the NSW CLA"), s 5L(1) of which provides that a defendant is not liable in negligence for harm suffered by a plaintiff as a result of the materialization of an obvious risk of a dangerous recreational activity engaged in by the plaintiff (cf s 19 Qld CLA). Under s 5K of that Act (cf s 18 Qld CLA), "recreational activity" is defined in terms of a sport or a pursuit or activity engaged in for enjoyment, relaxation or leisure. It defines "dangerous recreational activity" as a recreational activity that involves a significant risk of physical harm. Under s 5M of that Act (there is no comparable provision in the Qld CLA), a defendant does not owe a duty of care to a plaintiff who engages in a recreational activity to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff.

Ms Mikronis suffered injuries from a fall after her saddle slipped when horse riding with the Wollombi Horse Riding Centre, a business owned by the defendant. She alleged that her injuries were caused by the defendant's negligence in not properly tightening the saddle's girth straps around the horse. The defendant argued that the plaintiff's case must fail because of s 5L (cf s 19 Qld CLA) and s 5M. Dodd DCJ found that horse riding was a recreational activity, even though it was also a business which employed people, because it was a recreational activity for others, but that riding a horse on a trail was not a dangerous recreational activity. Whilst the risk of falling off a horse was obvious, the risk that the saddle may slip was not. At the time of preparing this paper, no appellate judgment had been published.

In *Falvo v Australian Oztag Sports Association*[39] (2006), the New South Wales Court of Appeal considered s 5K (cf s 18 Qld CLA) and s 5L (cf s 19 Qld CLA) of the NSW CLA. Mr Falvo seriously injured his right knee while playing a game of Oztag, a form of touch rugby in which players have tags attached by Velcro to the sides of their shorts. A player in possession of the ball must release it as soon as the opposition has ripped off a tag from the player's body, thus reducing to a minimum the need for physical contact between players. The game was played on a reserve occupied and controlled by the local council. The reserve was grassed but in some areas the grass had disappeared through wear and tear and the Council had levelled these areas with sand. The condition of the field was obvious. As Mr Falvo ran towards the opposing team's try line he encountered a bare patch, his knee gave way when his foot went into the sand and he collapsed in pain on the ground. Mr Falvo brought an action in negligence against both the Oztag Association and the Council and an additional claim against the Association for breach of an implied contractual term to take proper care for his safety. The primary judge found that Oztag was a "dangerous recreational activity" but that the condition of the reserve was within acceptable standards so that the action against the Council and the Association failed.

Ipp JA, with whom Hunt AJA and Adams J agreed, considered that the finding that the Council was not negligent was open on the evidence, observing:

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38 (2004) 1 DCLR (NSW) 369.

39 [2006] NSWCA 17.

> "[20] There are undoubtedly risks involved in playing sport (even of a non-contact kind), on surfaces of this standard. But it is a standard that the community accepts. It is impractical to require sports grounds to have surfaces that are perfectly level and smooth. Common sense tells one that the cost of perfection would be exorbitant and, if perfection were insisted upon, countless people in this country would be deprived of the opportunity to participate in sporting activities.
> [21] Slightly differing levels and sandy patches on sports grounds are part of the practical realities of everyday life to which legal principle must be applied: *Neindorf v Junkovic* [2005] HCA 75 at [8] per Gleeson CJ. In my view, no negligence can be attributed to the Oztag Association and the Council stemming from the condition of the ground."

The court distinguished the case from *Bujnowicz v Trustees of the Roman Catholic Church of the Archdiocese of Sydney*[40] (2005), where the plaintiff boy, in the course of a school touch rugby game, ran into a pothole on the school's rugby field sustaining severe injuries to his leg. The hole there was not obvious and could not be categorized as a depression in the ground or a mere alteration in levels but was a trap so that the defendant did not dispute that if the hole existed the rugby field was unsafe.

In considering s 5K (cf s 18 Qld CLA) and s 5L (cf s 19 Qld CLA) NSW CLA, Ipp JA referred to the recommendations in the Ipp Report. He considered that the definition of "dangerous recreational activity" had to be read as a whole, with due weight being given to the words "dangerous" and "significant". "Significant" bears not only on "risk" but also on the phrase "physical harm". His Honour considered that, consistent with the views of the High Court in *Rogers v Whitaker*,[41] a risk is significant when it is dependent on the materiality of the consequences to the person harmed. The expression should not be construed as capable of applying to an activity involving a significant risk of sustaining insignificant physical harm such as a sprained ankle or a minor scratch.

The "risk of physical harm" may be "significant" if the risk is low but the potential harm is catastrophic. The "risk of physical harm" may also be "significant" if the likelihood of both the occurrence and the harm is more than trivial; but the "risk of physical harm" may not be "significant" if despite the potentially catastrophic nature of the harm the risk is very slight. It will be a matter of judgment in each case whether a particular recreational activity is "dangerous". His Honour concluded that a "dangerous recreational activity" cannot mean an activity involving everyday risks in games such as Oztag which involve a degree of athleticism but with no tackling and no risk of being struck by a hard ball. The trial judge erred in finding that Oztag was "a dangerous recreational activity".

Sadly for Mr Falvo, having won that battle he nevertheless lost his appeal, because the primary judge's finding of no causal connection between Mr Falvo's knee injury and any negligence on the part of the respondents was found to be open on the evidence.

In *Fallas v Mourlas*[42] (2006), the New South Wales Court of Appeal constituted by Ipp, Tobias and Basten JJA considered, in lengthy separate reasons, whether hunting kangaroos by spotlight was a "dangerous recreational activity" within s 5K of the NSW CLA, the

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40 [2005] NSWCA 457.
41 (1992) 175 CLR 479, 490 - 491.
42 [2006] NSWCA 32.

meaning of the term "significant" and the relationship between a "significant risk" and an "obvious risk" under the NSW CLA.

Mr Fallas accidentally shot his friend Mr Mourlas while hunting kangaroos at night-time with the aid of a spotlight. Mr Fallas was driving the vehicle whilst Mr Mourlas sat in the front passenger seat and held the spotlight, shining it out the window while the other men in the vehicle shot. After about five or ten minutes, two of the men alighted and walked in front while the vehicle followed them. The vehicle stopped and Mr Fallas also alighted with a handgun to join the other men. Mr Fallas then returned to the vehicle still holding the handgun. Mr Mourlas asked him not to enter the vehicle with a loaded gun. Mr Fallas gave repeated assurances that the gun was not loaded and it was safe for him to enter the vehicle. Once inside, Mr Mourlas once again asked him not to bring the gun inside the car and to point the gun outside. Mr Fallas began "clocking [the gun] back and forward" in an effort to unjam it and pointed the gun in Mr Mourlas' direction. The gun accidentally discharged, shooting Mr Mourlas in the leg. One of the grounds on which Mr Fallas denied liability was that he was entitled to immunity under s 5L of the NSW CLA. The primary judge found that Mr Mourlas, who was not participating in the actual shooting but was seated in the vehicle holding the torch, was not engaged in a necessarily dangerous recreational activity that involved a significant risk of physical harm. It would not have been obvious to a reasonable person in his circumstances that he ran the risk of being shot whilst sitting in the vehicle holding the spotlight, so that even if the activity was a dangerous recreational activity he did not suffer harm as a result of the materialization of an obvious risk of a dangerous recreational activity.

Both Ipp and Basten JJA refused the appeal, Tobias JA dissenting. Basten JA observed that on the unchallenged findings of fact under the general law the defendant was plainly negligent. As the defendant pleaded reliance on s 5K and s 5L he bore the burden of proof with respect to the necessary factual elements. The primary judge was wrong, after identifying the activity as shooting kangaroos at night and the relevant risk as a wound caused by accidental discharge from a firearm, to distinguish between a person who merely drives or holds a spotlight and one who is involved in the actual shooting; the driver and the holder of the spotlight are as involved in the activity as the shooters.

The real issue was whether the risk involved in the activity of shooting kangaroos at night was a significant risk of physical harm. As in *Rogers v Whitaker*, where the harm is potentially catastrophic a very low level of risk may be significant, but where the harm is not serious at all the risk may not be considered significant until it reaches a much higher level. This approach adequately reflects the concept of dangerousness: cf *Falvo*. Basten JA considered that a risk of harm may be significant in three ways: first, a risk may be significant because the results of it eventuating are likely to be catastrophic; second, statistics might demonstrate whether a risk, such as accidental shootings on hunting expeditions, occurs with significant frequency or whether it is so rare as to constitute an insignificant risk; or third, the circumstances of the case may demonstrate that the risk of harm is significant. The first approach would allow for a risk to be significant because of its potential catastrophic consequences even where the risk was minuscule. This approach is inconsistent with the statutory test. The second approach was not dealt with on the evidence. Adopting the third approach, there was insufficient evidence of particular circumstances demonstrating the significance of the risk here. The defendant failed to establish a significant risk of injury occurring from the accidental discharge of a firearm whilst shooting kangaroos at night in the circumstances in which the plaintiff was involved.

Basten JA also noted that for the provisions to be engaged, a significant risk must materialize and result in the harm suffered by the plaintiff and that that risk must be "obvious" within its statutory meaning. The nature of the risk should be identified by reference to the particular circumstances and the position of the plaintiff at the time the harm is suffered or, if it be different, when the risk materializes. In this case the risk involved two elements: whether the gun was loaded and whether it was pointed towards the plaintiff. Under the definition of "obvious risk", it did not matter that there was a low probability of the risk occurring; there was an obvious risk of the defendant pointing the gun at the plaintiff and an accidental discharge of it. Although Basten JA considered the activity was not a dangerous recreational activity, so that it was unnecessary to determine whether the risk which materialized was an obvious risk "of" that dangerous recreational activity, he expressed at least doubt that the risk which materialized was an obvious risk "of" that dangerous recreational activity. The discharge of the gun may have been part of the risk of possession and maintenance of firearms generally rather than of the hunting activity, especially if, for example, the defendant was putting away the gun for the evening rather than preparing it to continue shooting. The statutory defence is consistent with the approach under the general law, so that it is necessary for the defendant to satisfy the court that the risk which materialized was both a risk "of" a recreational activity and that the recreational activity was dangerous because that risk was "significant". In this case the defendant failed to discharge either of those burdens.

Ipp JA referred to *Falvo*, not surprisingly, with approval. He added his agreement with Basten JA that an objective test was required in determining whether a recreational activity was dangerous. The word "significant" in s 5K means more than "foreseeable" under the test in *Wyong*; it connotes more than "real" but is not so wide as to require that the risk be likely or probable to occur; it is coloured by the words "risk" and "physical harm" which it qualifies. It is not practicable nor desirable to attempt to further define "significant" other than to say that it sets a standard somewhere between a trivial risk and a risk likely to materialize. Each individual case will have to be determined on its particular circumstances having regard to the ordinary meaning of the term. Expert opinion and the application of logic, common sense or experience may be relevant to the degree or incidence of risk in the particular circumstances of the case. Whether there is a significant risk of physical harm will require a value judgment dependent on the circumstances of each individual case. He agreed with Basten JA that the defendant has the burden of proof in establishing the existence of a significant risk of physical harm and of the other elements in s 5L. He provided examples of where he contended that a significant risk may make a recreational activity dangerous and explained that this may be an entirely different risk from a risk, which may or may not be obvious, that materializes. Ipp JA disagreed with Basten JA's proposition that for s 5L to be engaged, a significant risk must materialize as an obvious risk and result in harm to a plaintiff, stating that there is nothing in s 5L to require this. He suggested that in determining whether a recreational activity involves a significant risk of physical harm, regard should be had to the activities ordinarily involved in that particular recreational activity, that is, the objective facts. His Honour also recognized that other factors such as time, place, competence, age, sobriety, equipment and even the weather may convert a regular recreational activity into a dangerous one. It was therefore necessary to take into account all the circumstances in determining whether a recreational activity was dangerous so as to avoid unfairness and injustice. His Honour considered that s 5K and s 5L were based on recommendations 11 and 12 of the Ipp Report, which gave as the rationale for those recommendations that a plaintiff who engages in a dangerous recreational activity in

circumstances where the risks are obvious is to be regarded as having assumed those risks. The sections should be construed consistently with that rationale.

Ipp JA observed that Mr Mourlas had no previous experience in shooting kangaroos, that Mr Fallas was the only one in the group who was a "licensed shooter" and the evidence generally suggested that the men in the group were not experienced at shooting. The accident occurred at about 10.30 pm after some of the men had driven for hours and had consumed alcohol so that their alertness and ability to concentrate would not have been at an optimum level. In these circumstances there was a significant risk that one or other of the men, while leaving or entering or being in the vehicle as Mr Mourlas was operating the spotlight, might negligently handle a loaded firearm and cause someone in the vehicle to be shot. Mr Mourlas was engaging in a recreational activity which carried with it a significant risk of physical harm, that is, a dangerous recreational activity within the meaning of s 5K. Ipp JA considered, however, that Mr Mourlas was not injured by the materialization of an obvious risk. He constantly told Mr Fallas to take care with the gun and to make sure it was not loaded. Mr Fallas' replies and his actions reassured Mr Mourlas that the gun was unloaded and that he was taking care. There was no obvious risk to Mr Mourlas of being shot in those circumstances, so that he remained in the vehicle and looked away from Mr Fallas and the firearm towards the other men in the group immediately prior to the discharge of the gun.

Tobias JA would have overturned the primary judge's findings. He considered that "significant" in the context of the NSW CLA means a risk which is not merely trivial but, generally speaking, one which has a real chance of materializing. The subject activity was clearly capable of involving a significant risk of physical harm. Tobias JA adopted Basten JA's third approach as the correct approach to a case such as this. He also referred with approval to Ipp JA's observations that "significant" means a standard somewhere between trivial and likely. A real chance of the risk materializing lies somewhere between those two standards although probably closer to the second than the first. He considered there to be merit in not seeking to define "significant" with precision, as its application requires a normative judgment in the light of the particular facts and circumstances of each case. There is no danger in adopting as no more than a general guide that the risk should have a real chance of materializing for it to qualify as significant.

Tobias JA preferred Ipp JA's approach that, for the purposes of the definition of "dangerous recreational activity", the scope of the activity must be determined by reference to the particular activities engaged in by the plaintiff at the relevant time, that is, the period immediately before the plaintiff suffers the relevant harm as a consequence of the defendant's negligence. In determining that question, the particular conduct actually engaged in by the plaintiff and the circumstances which provide the context in which that conduct occurs must be considered. The activity here clearly involved a significant risk of physical harm which included the negligent discharge of a loaded firearm within the confines of the car. This was a risk which lay somewhere between a trivial risk and one likely to materialize and was probably closer to the latter than the former. The totality of the circumstances here constituted a recipe for disaster in which the risk of a firearm being accidentally discharged and one of the participants being shot had a clearly significant chance of materializing. The activity involved a significant risk of physical harm so that it was a "dangerous recreational activity" under s 5K. The statutory definition of "obvious risk" requires regard to be had to the particular circumstances in which a plaintiff suffers the relevant harm to determine whether the risk which resulted in that harm would have been obvious to a reasonable person in the plaintiff's position. All the surrounding circumstances immediately prior to the

suffering of the harm must be identified to determine whether the risk which materialized was "obvious". The risk of the pistol being discharged in the light of the defendant's assurances would only be obvious under the NSW CLA if a reasonable person in the plaintiff's position had some justifiable reason to disregard the defendant's assurances that the pistol was unloaded and safe. A reasonable person would consider the defendant's conduct as unreliable because he continued to fiddle with the jammed pistol within the confines of the vehicle. Although the defendant's conduct was grossly negligent, the risk of harm materializing from his conduct would have been apparent to and recognized by a reasonable person in the position of the plaintiff as likely to result in the pistol being discharged. The defendant satisfied the requirements of the statutory defence so that he was not liable in negligence for the injuries sustained by the plaintiff due to his negligence.

In *Edwards v Consolidated Broken Hill Ltd*[43] (2005), the plaintiff was rendered paraplegic when he fell 4.9 metres whilst riding a bicycle along a railway spur line which was a common shortcut used by trespassers. A number of rail cars were parked on the spur creating a dramatic narrowing of the space between the rail cars and the spur edge, through which the plaintiff bicycled. The defendant argued that the plaintiff was injured as a result of the materialization of an obvious risk of a dangerous recreational activity engaged in by him. The primary court held that the riding of a bicycle scarcely fitted the concept of what the legislature must have intended by its expression "dangerous recreational activity". The risk of falling from the spur because the space for passage had been limited by the presence of rail cars was not a risk of bicycle riding as such but rather a risk created by the defendant's activity in storing the railway cars in that position.

The defendant appealed.[44] The New South Wales Court of Appeal considered the meaning of obviousness of risk and allowed the appeal but only to the extent of varying the plaintiff's apportionment of responsibility through contributory negligence upwards from one third to one half. The court did not discuss the concept of "dangerous recreational activity". Ipp JA, with whom Giles JA and Hunt AJA agreed, relied on the High Court's unanimous judgment in *Thompson v Woolworths (Qld) Pty Ltd*[45] where the court stated:

> "The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response."

He concluded:

> "Obviousness of risk is not a phrase that denotes a principle or rule of the law of negligence. It is merely a descriptive phrase that signifies the degree to which risk of harm may be apparent. It is a factor that is relevant to whether there has been a breach of the duty of care. … The weight to be attached to the obviousness of the risk depends on the totality of all the circumstances. In some circumstances it may be of such significance and importance as to be effectively conclusive."

The court concluded that the primary judge's findings as to the defendant's breach of its duty of care were open on the evidence.

What can be gleaned from these cases? Whether the interpretation by the courts of s 13, s 18 and s 19 Qld CLA will materialize into an obvious risk of dangerous changes to the common

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43 [2005] NSWSC 301.

44 *Consolidated Broken Hill Ltd* v *Edwards* [2005] NSWCA 380.

45 (2005) 79 ALJR 904.

law, fairness and justice remains to be seen! The few decided cases under comparable provisions in other States suggest that the changes to the general law wrought by these so-called tort law reforms may not be as extensive as initially expected. On the cases so far decided I venture to make the following observations. At least in the circumstances of *Falvo*, Oztag is not a dangerous recreational activity, although the primary judge thought it was. In the circumstances of *Mikronis*, horse riding on a trail is not a dangerous activity. In the circumstances of *Fallas*, two of three appellate judges thought that holding a searchlight at night whilst kangaroo hunting was a dangerous activity; one appellate judge and the trial judge thought it was not. In the circumstances of *Edwards*, riding a bicycle along a narrow spur was not apparently a dangerous recreational activity. It seems it is for a defendant to bring itself within the protection of s 19 Qld CLA. The cases suggest that whether an activity involves a *significant* degree of risk of physical harm is apparently a difficult jurisprudential concept about which distinguished legal minds may disagree. In establishing whether or not there is a significant risk, statistical evidence of the type referred to by Ipp and Basten JJA in *Fallas* and McHugh and Callinan JJ in *Woods* may be relevant. The review of the cases set out earlier does make the simple Macquarie Dictionary definition of "significant" pretty attractive! For a defendant to benefit from the statutory defence, the plaintiff must suffer harm as a result of the materialization of an obvious risk *of* a dangerous recreational activity, not some other activity. How did that Senior Counsel describe the Qld CLA?

Are children particularly vulnerable?

Some commentators have expressed concern that provisions like s 18 and s 19 Qld CLA may harshly impinge on the rights of children injured through reckless conduct resulting from the materialization of an obvious risk of a dangerous recreational activity engaged in by the child.[46] In determining if that is so the following cases are informative.

In *Doubleday v Kelly*[47] (2005), the New South Wales Court of Appeal (Bryson JA, with whom Young CJ in Eq and Hunt AJA agreed) considered an appeal from a jury verdict giving judgment for personal injury damages in favour of a child plaintiff who was injured when she was seven years old in an accident at the defendant's house in rural New South Wales. She was having a "sleep over" (that well-known misnomer) with the defendant's four year old daughter. The girls woke up early and without any parental supervision went outside and put on roller skates. They found it difficult to skate on the dirt driveway and went to the trampoline. The plaintiff had not seen a trampoline before and thought it was a hard surface on which she might be able to roller skate. She climbed on to the trampoline, rolled backwards and fell off, injuring herself. The contributory negligence provisions under the NSW CLA referred to the standard of care required of the person who suffered harm as being that of a reasonable person *in the position of that person* (my emphasis and compare the definition of "obvious risk" in s 13 of Qld CLA). This was a generalized concept and should be interpreted in the light of the fact that the plaintiff was a seven year old child. To do otherwise would be a radical departure from the common law. The characteristics of a reasonable person in the position of the plaintiff include therefore the characteristic of being a normal child of seven years. The primary judge was right to conclude that a seven year old child could not normally be expected to have a perception of the dangers of a trampoline. In considering s 5L of the NSW CLA (cf s 19 Qld CLA), the court also rejected the contention that the full force of s 5L applies to children as though they were adults because the words in

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46 See for example, Insurance Reform's submission in respect of the *Civil Liability Bill* 2002 (Qld).

47 [2005] NSWCA 151.

s 5F defining "obvious risk" (cf s 13 Qld CLA) require consideration of the position of the plaintiff.

In *Dederer v Roads and Traffic Authority*[48] (2005, the plaintiff, a 14 year old boy, was rendered paraplegic when he dived from a bridge and struck the riverbed below. He had frequently seen children and adults jumping and diving from the bridge either from the ledge at its base or from the top of the pedestrian handrail. He had seen boats passing underneath through the channels and none had run aground which indicated to him that the water in the channels was deep. The day before the accident he had jumped twice into the river from the bridge, first from the ledge at its base and then from the top of the handrail. On neither occasion did his feet touch the bottom of the river. He saw other people jumping and diving from the bridge that day. The court accepted that the plaintiff was engaged in what was objectively a "dangerous recreational activity" but held that the risk of injury was not an "obvious risk", which must be judged by reference to a "reasonable person in the position of [the plaintiff]". He was a 14 year old boy who had seen a large number of people jumping and diving off the bridge over many years without any apparent attempt by police or council rangers to stop them and no known cases of injury. Having regard to his age and lack of maturity, the fact that he knew vessels passed through the channels, that he looked and saw the water was dark green and could not see the bottom, all of which indicated to him that the water was deep, the risk of serious permanent physical injury would not have been obvious to him even if it would have been obvious to a mature adult.[49] At the time of preparing this paper no appellate decision had been published.

As far as I have been able to ascertain, Victoria does not have provisions equivalent to s 18 and s 19 Qld CLA. The following recent Victorian case is nevertheless worth a mention. In *Ballerini v Shire of Berrigan*[50] (2004), a 16 year old youth was injured when he dived from a log into a lagoon which had been used for many years as a local swimming pool. He struck his head on the bed of the lagoon and was injured. Smith J held that the danger was not obvious to the plaintiff taking into account the defendant's awareness of the danger; the plaintiff's age; that the danger was not objectively obvious; that the log had been used by young people as a diving platform for many years without any prior injury; that the lagoon adjoined a park maintained by the defendant and that the log and swimming hole enjoyed a reputation in the community as a safe facility. The defendant was liable in negligence for breaching its duty to the plaintiff but the damages were reduced by 30 per cent for the plaintiff's contributory negligence. Both parties appealed.[51] Nettle JA (with whom Callaway and Chernov JJA agreed) found that the primary judge was entitled to conclude on the facts found, which were open on the evidence, that the defendant breached its duty to the plaintiff causing him to suffer injury. The court also refused to interfere with the primary judge's findings as to contributory negligence and the appeal and cross-appeal were dismissed.

The New South Wales decisions in *Doubleday* and *Dederer* decided under the NSW CLA, when compared to the Victorian decision of *Ballerini* decided without provisions comparable to s 5K and s 5L NSW CLA or s 18 and s 19 Qld CLA, suggest that children may be no more vulnerable to having claims denied under the Qld CLA than at common law. A minor's age

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48 [2005] NSWSC 185.

49 Above, [85] - [87].

50 [2004] VSC 321.

51 *Berrigan Shire Council v Ballerini* [2005] VSCA 159 and *Berrigan Shire Council v Ballerini (No 2)* [2006] VSCA 65.

will always be a relevant consideration in determining whether a defendant can avoid liability under s 19.

In deciding whether a child plaintiff's claim in negligence for harm suffered by the child materialized from an obvious risk of a dangerous recreational activity engaged in by the child plaintiff (s 19(1)), the court must consider whether the risk was obvious. This will involve a consideration whether it would have been obvious to a reasonable person *in the position of that person* (s 13(1)). That in turn will involve a consideration of what would have been obvious to a reasonable child of the age and in the position of the child plaintiff. I am not presently persuaded that, because s 19(2) states that s 19 applies whether or not the person suffering harm was aware of the risk, this qualifies the definition of "obvious risk" referred to in s 18 and set out in s 13 of the Qld CLA. The NSW CLA s 5L(2) is in similar terms to s 19(2) Qld CLA but the New South Wales Court of Appeal rejected that interpretation in *Doubleday*. It would seem that if the legislature were intending such a startling result it would have stated it in the clearest of terms. It has not.

The relationship between the Qld CLA, reforms in other jurisdictions, consumer protection legislation, s 68B TPA and the impact of waivers of liability on personal injury claims, especially those involving children

The Ipp Report vision of uniform legislation in this area throughout the States and Commonwealth has certainly not been realized but most jurisdictions have adopted legislation in some ways comparable to the Qld CLA: see *Trade Practices Amendment (Personal Injuries and Death) Act (No 2)* 2004 (Cth); *Civil Law (Wrongs) Act* 2002 (ACT); *Civil Liability Act* 2002 (NSW); *Personal Injuries (Liabilities and Damages) Act* 2003 (NT); *Civil Liability Act* 1936 (SA) (formerly *Wrongs Act* 1936 (SA)); *Civil Liability Act* 2002 (Tas); *Wrongs Act* 1958 (Vic) and *Civil Liability Act* 2002 (WA). Joachim Dietrich in his article "Duty of care under the 'Civil Liability Acts'"[52] usefully discusses the position in the various jurisdictions. The term "obvious risk" is widely defined in the various jurisdictions as a risk obvious to a "reasonable person in the position of" the plaintiff. The provisions of s 13(5) of the Qld CLA, which appears to favour plaintiffs, seem to be unique.

As to dangerous recreational activities, plaintiffs engaged in them are disentitled from bringing actions for harm caused by the materialization of an obvious risk of that activity not only in Queensland and, as already noted, in New South Wales[53] but also in Tasmania[54] and Western Australia.[55] The definitions of "dangerous recreational activity" in each of those States are generally comparable to and in as equally wide terms as the Qld CLA. Other jurisdictions do not seem to have like statutory provisions.

Dietrich comments that there seems to be very little rationale for many of the changes wrought to the common law by the various civil liability statutes in the different jurisdictions and regrets that a more cautious approach to their denial of basic common law rights was not taken by the legislatures. He is particularly critical of the unrestrained approach underlying the NSW CLA, which he describes as "worrying". That is because under s 5M NSW CLA a defendant does not owe a duty of care to a plaintiff if the relevant risk was the subject of a risk warning; if the plaintiff is an "incapable person" (defined in s 5M(12) as "a person who, because of the person's young age or a physical or mental disability, lacks the capacity to

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52 (2005) 13 *Torts Law Journal* 17.
53 *Civil Liability Act* 2002 (NSW), s 5L.
54 *Civil Liability Act* 2002 (Tas), s 20.
55 *Civil Liability Act* 2002 (WA), s 5H.

understand the risk warning") the defendant may still rely on the risk warning if it was given to a parent or accompanying person having parental responsibility for the incapable person so that the incapable person injured by the materialization of an obvious risk of a dangerous recreational activity will have no right of action. The *Civil Liability Act* 2002 (WA) s 5I also seems to exclude liability for harm arising from obvious risks occurring in dangerous recreational activities to a child of any age or otherwise "incompetent person" where a risk warning has been given to an adult controlling or accompanying the child or incompetent person. The Qld CLA has no comparable provision. Dietrich suggests that the populist politics accompanying the "torts crisis" has infiltrated the drafting process in the statutes and predicts that it will be some time before the full and most likely harsh impact of some of those provisions will be realized.

Despite the Qld CLA, a plaintiff injured whilst undertaking recreational activities may be able to sue the defendant provider of the services not only in negligence but also for breach of contract where the defendant is a corporation under the TPA, because s 74 TPA implies terms that the services will be rendered with due care and skill and that materials supplied in connection with the services will be reasonably fit for the purpose. Section 68 TPA prevents a corporation from excluding, restricting or modifying the application of s 74, but that is now subject to s 68B TPA.

Section 68B TPA, which commenced operation on 19 December 2002 as part of the Commonwealth Government's response to the so-called insurance torts law crisis, provides that a corporate supplier of recreational services may include a term in a contract that excludes, restricts or modifies or has the effect of excluding, restricting or modifying the implied warranties contained in s 74 TPA[56] so long as the exclusion, restriction or modification is limited to liability for death or personal injury and the contract was entered into after the commencement of s 68B. The section gives a wide meaning to "personal injury", with injury including any physical or mental injury. "Recreational services" are defined as services that consist of participation in a sporting activity or similar leisure-time pursuit or any other activity that involves a significant degree of physical exertion or physical risk and is undertaken for the purposes of recreation, enjoyment or leisure.

Because the Qld CPA specifically states that it is not a code, statutes offering consumer protection, including the TPA, the *Fair Trading Act* 1989 (Qld) and the *Sale of Goods Act* 1896 (Qld) may continue to apply.

In most jurisdictions, minors (those under 18 years of age) cannot generally enter into contracts other than contracts for "necessaries", which are binding on minors if they do not impose onerous, harsh or unconscionable terms on the minor. In New South Wales, minors can enter into contracts unless the minor is so young as to lack understanding of the significance of the contract but a contract with a minor is only presumptively binding on the minor where the minor's participation in the contract is for his or her benefit at that time.[57] It follows that a Queensland recreational service provider may not be able to contract out of its obligations under consumer protection legislation in respect of minors.

As I have noted, s 68B TPA entitles a defendant corporation to include a contractual term waiving liability for the implied warranties imposed by s 74 TPA in respect of the

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[56] Implied warranties that services will be rendered with due care and skill and that any material supplied in connection with the services will be reasonably fit for the purpose.

[57] *Minors (Property and Contracts) Act* 1970 (NSW), s 8 and s 1.9.

performance of recreational services. A well-drafted waiver clause in a contract as envisaged by s 68B TPA may also exclude liability for any tort claims in negligence for breach of a duty of care. The *Fair Trading Act* 1989 (Qld) provides some limited consumer protection to those contracting for services and s 107 of that Act is in comparable terms to s 68 TPA; it contains no post-Ipp Report amendment comparable to s 68B TPA. In South Australia,[58] Victoria[59] and Western Australia[60] (but not Queensland) there are legislative equivalents to s 68 and s 74 TPA which, unlike the TPA, do not limit the consumer protection they provide to those contracting with corporate service providers. As far as I have been able to ascertain, South Australia and Western Australia have not enacted any legislative equivalent to s 68B TPA so that a recreational services provider is there not permitted to contract out of its statutory obligations. Contracts for recreational services entered into in those States, whether by corporations or individuals, may not be made subject to a waiver clause. Joachim Dietrich in his article "Liability for personal injuries arising from recreational services: The interaction of contract, tort, State legislation and the Trade Practices Act and the resultant mess"[61] considers: "The prospect of inconsistent rights arising from State and Commonwealth legislation is one of the minefield of complexities that must now be negotiated as a result of the 'reforms' relating to recreational services".[62] He queries whether courts will have to determine disputes under s 109 of the Constitution when there is a conflict between Commonwealth and State legislation on the same subject matter.

In any case, the effectiveness of a contractual waiver, particularly in circumstances alleging incorporation by notice such as in a ticket, is often questionable, especially if there has been any misrepresentation in relation to the effect or meaning of the waiver. The courts have often interpreted such a clause narrowly unless the words unambiguously exclude liability for negligence and serious breach of contract. That, however, is a topic deserving its own LexisNexis conference and cannot be fully dealt with here.

A contract with a Queensland minor participating in a dangerous recreational activity which contains a waiver may not be binding on the minor because it is not a contract for necessary goods or services and a waiver clause such as envisaged by s 68B TPA is plainly not for the benefit of the minor. Where children are involved, a defendant service provider of recreational services in Queensland may seek a signed consent by a parent or guardian, but even that may well not be binding on the child as it may not carry with it any power to act on behalf of the minor.[63] Well-drafted contractual waivers of the type envisaged by s 68B TPA may therefore be binding on adult users of recreational services but perhaps not on children. Dietrich suggests that even if a contract of service is not binding on the minor, the minor may still be able to sue for breach of that contract, but he concedes that it may be unlikely that a court would allow a minor to avoid a waiver clause but continue to enforce the protection of the contract and the effect of, for example, s 74 TPA's implied terms.

Dietrich points out that recreational service providers may well endeavour to require parents to sign an indemnity agreement in respect of minors taking part in recreational activities under which the parents would indemnify the provider against damages or loss arising from a

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58 *Consumer Transactions Act* 1972 (SA), s 7 and s 8.

59 *Fair Trading Act* 1999 (Vic), s 32J, s 32JA, s 32L, s 32LA and s 32N; s 32N, like s 68B TPA, allows a supplier of recreational services to waive the statutorily implied conditions.

60 *Fair Trading Act* 1987 (WA), s 34 and s 40.

61 (2003) 11 *Torts Law Journal* 1.

62 Above, 7.

63 See *Homestake Gold of Australia Ltd v Peninsula Gold Pty Ltd* (1996) 131 FLR 447, 456.

claim by the minor against the provider. He argues that it would be contrary to public policy to deprive minors of their legal rights by this backdoor means and predicts that it would be unlikely that the courts would enforce such an agreement.

Guy Boyd in "Personal injuries law reform: An unintended effect on product liability claims?"[64] suggests that Part VA TPA ("Liability of manufacturers and importers for defective goods") may provide a consumer of recreational services with a TPA claim for personal injury damages brought under it by alleging that the manufacturer of the product used in the recreational service (for example, a saddle in horse riding, a parachute in skydiving or skis in snow or water-skiing) was liable for injuries caused by the defective parts. He predicts that because this may be the only cause of action remaining to some consumers injured by the materialization of an obvious risk of a dangerous recreational activity, Part VA TPA, and presumably similar State consumer protection legislation, may attract more attention so that the recent State and Commonwealth tort reforms may not achieve the desired reduction in claims against recreational service providers.[65]

Conclusion

The Qld CLA and the somewhat comparable Commonwealth and State statutes to which I have referred appear to bring wide-ranging changes to actions for personal injuries involving recreational activities, especially if these activities are dangerous. It is impossible to accurately predict how the various statutes will be interpreted by the courts and whether those provisions will ultimately have the effect envisaged by the Ipp Report and the legislation. I question whether *Romeo, Agar, Woods, Swain* and *Ballerini* would have been decided differently under s 18 and s 19 Qld CLA and whether the decisions in *Mikronis, Falvo, Fallas, Doubleday* and *Dederer* would have been decided differently had the Ipp Report reforms not been implemented by the relevant State legislatures. Such cases will always turn very much on their own facts.

In the meantime, as we wait for principles of law to be developed, refined and applied by courts to particular factual situations, I suggest that when you are undertaking your brief moments of enjoyable or relaxing activity, be careful. If you have been working too hard on your clients' claims and defences in respect of injuries received whilst undertaking arguably dangerous recreational activities, your tiredness, your lapses of attention, your hangover and the late hours you keep may place you at a significant degree of risk of physical harm caused by the materialization of a risk which any reasonable person in your position would regard as obvious, so that a negligent provider of services for your enjoyable or relaxing activity could claim a defence under s 19 Qld CLA! Now, how did that Senior Counsel describe the Qld CLA?

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64 (2003) 11 *Torts Law Journal* 1.

65 Above, 13 - 14.