IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C12 of 2015

BETWEEN:

PATRICK JOSEPH STEWART
First Appellant

BERYL ANN VICKERY (NEE STEWART)
Second Appellant

MICHAEL PATRICK STEWART
Third Appellant

and

BENJAMIN ALLAN ACKLAND
Respondent

APPELLANTS' SUBMISSIONS

Part I - Publication

1. The Appellants certify that this document is in a form suitable for publication on the Internet.

Part II - Issues

2. Whether s.5L *Civil Liability Act, 2002 (NSW)* ("*CLA*") applies so that the Appellants are "*not liable in negligence*".

3. Whether the word *"risk"* in s.5L *CLA* (and s.5F *CLA*) means the mechanism causing the injury as distinct from the extent of the injury suffered by a plaintiff.

4. Whether the scope of the Appellants' duty of care extended to warning the Respondent of the risks involved in performing somersaults on an inflated jumping pillow.

5. Whether the scope of the Appellants' duty of care extended to prohibiting somersaults on an inflated jumping pillow.

6. Whether the Appellants breached their duty of care to the Respondent by failing to warn the Respondent of the risks involved in performing somersaults on the inflated jumping pillow or by failing to prohibit somersaults on the inflated jumping pillow.

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Part III – s.78B Judiciary Act 1903 (Cth)

7. The Appellants have considered whether any notice should be given pursuant to s.78B *Judiciary Act 1903 (Cth).* No notice is required.

Part IV – Citation

8. The primary judge's reasons are unreported: *Ackland v Stewart & Ors* [2014] ACTSC 18

9. The Court of Appeal's reasons are unreported: *Stewart & Ors v Ackland* [2015] ACTCA 1

Part V – Statement of facts

10. On the afternoon of 10 October 2009 the Respondent, then a 21 year old arts law student at the University of New England, broke his neck when attempting to perform a backward somersault (or "backflip") on a jumping pillow in an amusement park conducted by the Appellants near Tingha, in rural New South Wales. One of the Respondent's companions said that the Respondent landed "*awkwardly on his head*".

11. The jumping pillow was inflated with air and measured approximately 20m by 10m.

12. Dr Olsen, an engineer with expertise in biomechanics, who was called as a witness by the Respondent said in his report[1] that "*the surface of the pillow is not soft and does not yield much to a person standing. I would estimate that with a weight of 75kg, I would not have compressed the surface of the pillow more than 50mm*".

13. In his oral evidence in chief[2], Dr Olsen said in answer to a question from the primary judge (emphasis added):

> *His Honour: So it doesn't deflect much beyond the 50 millimetres? – Not much. <u>It's not like a trampoline; it's different to a trampoline</u>. It's actually under pressure, whereas a trampoline is under tension. <u>It behaves- it's a completely different dynamic</u>.*
>
> *His Honour: The trampoline, the energy of the jumper is transmitted into the springs? – Yes.*
>
> *His Honour: And then that is used to create the energy which lifts them again? – Yes, your Honour.*
>
> *His Honour: But here it's the compression of the air, is that correct? – Yes, that's correct, your Honour. Except, your Honour, strictly speaking*

[1] Exhibit 40 at page 27
[2] T297.11-35

it's not so much the springs, it's more the fabric.

His Honour: The fabric? – The fabric.

Mr Webb: Just taking up his Honour's question, is there an immediate difference between what happens when you step onto a trampoline and when you step onto the surface of the jumping pillow?- Yes.

Mr Webb: What is that difference? – It's not always very easy to walk on a trampoline, because your feet sink quite low. I've found it awkward, having walked on a trampoline, to walk on it, whereas it was very easy to walk on the jumping pillow. It felt like a solid surface almost.

14. Earlier in the day, the Respondent had observed other people, including some of his companions and some children, performing forward and backward somersaults on the jumping pillow. The Respondent used the jumping pillow more than once but did not attempt somersaults until the afternoon.

15. There were no signs prohibiting backflips or other inverted manoeuvres. Staff employed by the Appellants did not attempt to prevent anyone performing such manoeuvres or to warn of the risks involved in doing so.

16. When the Respondent first attempted a somersault, he "*landed awkwardly*" but was not hurt. He then made a second attempt at the manoeuvre and was injured.

17. The Appellants had received correspondence from Jumping Pillows Pty Ltd, the manufacturer (or distributor) of the jumping pillow, advising that signs should prohibit somersaults or inverted manoeuvres.[3] The manufacturer also recommended that activities on the jumping pillow be supervised at all times, whilst noting "*that under current Australian Standards a jumping pillow does not have to be supervised*". However, the correspondence also advised owners to seek advice from their insurance company or lawyers and there was no evidence as to why the manufacturer considered it necessary or appropriate to proffer that advice. The correspondence did not refer to the risk of catastrophic injury and there was no evidence that the Appellants were specifically aware, beyond the 'common knowledge' of the general public, of the risk of catastrophic injury as distinct from minor injury.

18. The Respondent gave evidence that he appreciated that there was a risk of hurting himself if he landed on his neck on a trampoline[4], although he later sought to resile from that evidence[5]. He also gave evidence that he appreciated that he could possibly land on his neck on the jumping pillow[6],

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[3] Exhibit 6
[4] T142.27-.45
[5] T149.39-150.1
[6] T147.45

although he denied that he knew that there was a risk he could hurt himself.[7]

Part VI: Statement of argument

(i) Dangerous recreational activity

19. Section 5L *CLA* provides that a defendant is "*not liable in negligence*" if the injury suffered was "*as a result of the materialisation of an obvious risk of a dangerous recreational activity*". Accordingly, in a case in which s.5L *CLA* is in issue, it is appropriate to first consider that defence before determining issues of duty, breach and causation.

20. A defendant must establish that:

(i) the plaintiff was engaged in a *"recreational activity"*;

(ii) the recreational activity was a "*dangerous"* one, that is, the recreational activity was one which "*involves a significant risk of physical harm"* (s.5K);

(iii) there was a risk *"of that activity"* which was an "*obvious"* one, that is, "*a risk that, in the circumstances would have been obvious to a reasonable person in the position of [the plaintiff]"* (s.5F); and

(iv) the harm suffered was *the result of the materialisation of* that 'obvious risk'.

21. The first requirement, namely, that the Respondent was engaging in a *"recreational activity"* in "*performing a back somersault on a jumping pillow*", was not contentious[8].

22. The expressions "*dangerous recreational activity"* and "*obvious risk"* are defined by s.5K *CLA* and s.5L *CLA* respectively. Each involves an objective test[9]. The legislation expressly applies even if the Respondent was not aware of the risk: ss.5F, 5L(2).

23. Obvious risks include risks that are patent or of common knowledge (s.5F(2)) and may include risks that are not prominent, conspicuous or physically observable: s.5F(4).

24. In this case *"a reasonable person in the position of* [the Respondent]" means a young adult with sufficient intelligence to study law at university, who was not inebriated and who was deliberately intending to perform the inverted 'back flip' manoeuvre above a surface which Dr Olsen said "*felt like a solid surface almost*".

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[7] T148.14-.22

[8] Primary Judgment [295]

[9] *Fallas v Mourlas* [2006] NSWCA 32, (2006) 65 NSWLR 418; *Great Lakes Shire Council v Dederer* [2006] NSWCA 101, [2006] Aust Torts Reports 81-860 at [152]; *Carey v Lake Macquarie City Council* [2007] NSWCA 4, [2007] Aust Torts Reports 81-874 at [93]; *Streller v Albury City Council* [2013] NSWCA 348, [2013] Aust Torts Reports 82-146 at [30]-[31]

25. The primary judge[10] and Walmsley AJ[11] in the Court of Appeal, with whom Robinson AJ agreed, found that attempting to perform an inverted manoeuvre on an inflated jumping pillow was a "*dangerous recreational activity*", that is, an activity which "*involves a significant risk of physical harm*". Penfold J dissented on that issue.

26. However, each of the four judges below found that, although suffering a minor injury was objectively obvious, suffering a catastrophic injury was not an "*obvious risk*" of failing to properly perform an inverted manoeuvre on the jumping pillow[12].

27. That is, in terms of the definition in s.5F *CLA,* they found that suffering a catastrophic injury was not "*a risk that, in the circumstances would have been obvious to a reasonable person in the position of [the Respondent]*" but that the risk of suffering only a minor injury would have been obvious to such a person.

28. On the question of whether attempting a backflip on the jumping pillow was a "*dangerous recreational activity*", the reasoning of the primary judge and Walmsley AJ was that the relevant activity, namely an inverted manoeuvre above a surface firm enough to support a standing adult, was dangerous within the meaning of s.5K because it involved a risk of a catastrophic injury.

29. The primary judge and Walmsley AJ each found that there was '*a significant risk of physical harm*' because, objectively, "*performing a backflip on a jumping pillow exposes the performer to a risk of catastrophic harm if not executed perfectly so that the performer instead of landing on his or her feet lands head first on the surface of the pillow*"[13].

30. However, the reasoning assumed that such a risk would only be apparent to an expert in biomechanics. Penfold J's reasoning on the issue of 'dangerous recreational activity' was to similar effect, that is, that no one except an expert in biomechanics would be aware of the dangers concerned[14].

31. Thus, although the primary judge applied "*common sense*" in considering the probability of "*the attempted somersault going awry*"[15], all of the judges found, incorrectly it is submitted, that it required biomechanical expertise, not merely common knowledge and common sense, to appreciate the risk of serious injury from landing awkwardly on the head on a surface described as "*like a solid surface almost*" and which deflected no more than 50mm if a 75kg person stood on it.

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[10] Primary judgment [296]
[11] CA judgment [120]-[123]
[12] Primary judgment [303], CA judgment [147]
[13] CA judgment [120]; primary judgment [296]
[14] CA judgment [36]
[15] Primary judgment [296]

32. The Appellants submit that, to the contrary, although biomechanical expertise may have been required to explain, as Dr Olsen did[16], the precise internal mechanism of the severe neck flexion which caused permanent injury and to calculate the forces involved, such expertise was not required to perceive the risk of injury, including serious injury, from landing on the head on such a surface.

33. That is because the essential factor on which Dr Olsen's opinion was based, namely, the relative firmness of the surface of the jumping pillow was all that, objectively, an adult needed to know in order to appreciate that more than a minor injury could be suffered if an inverted manoeuvre was not performed properly on the jumping pillow, so that a person landed with the full weight of the body on the head or back of the neck.

34. None of the facts and circumstances listed by Walmsley JA[17], considered individually or together, negates the fundamental commonsense, common knowledge proposition that landing on the head or neck on a surface which feels almost solid with the full weight of the body may cause serious injury.

35. Nevertheless, even if specialist knowledge is required to prove that there was a *dangerous recreational activity*, as each of the judges below accepted that "*a reasonable person in the position of [the Respondent]*" would perceive some risk of minor injury[18] from that activity, even without having any biomechanical expertise, it must follow that, if the expression "*a risk*" in s.5F *CLA* directs enquiry to the particular mechanism by which the activity may potentially cause "*harm*", rather than to the degree of that harm, then the primary judge and the Court of Appeal erred in differentiating between minor harm and serious harm in finding that there was not an "*obvious risk*".

36. The Appellants submit that, for the purposes of s.5F *CLA* (and thus s.5L *CLA*), the expression "*a risk*" directs attention to the mechanism by which the harm may be suffered, not to the degree of harm which may result from the risk eventuating. That is, the expression "*a risk*" in s.5F has the first meanings ascribed to "*risk*" in the Macquarie dictionary namely, "*exposure to the chance of injury or loss; a hazard or dangerous chance*"[19] and the Oxford dictionary namely, "*hazard, danger; exposure to mischance or peril*".[20]

37. That interpretation of s.5F is consistent with the distinction in the text of s.5L between the "*harm suffered*" and the "*obvious risk*" which materialized and resulted in that harm.

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[16] Exhibit 40
[17] CA judgment [145]-[146]
[18] Primary judgment [303], CA judgment [147]
[19] *Macquarie dictionary*, 6th Ed, 2013
[20] *Oxford dictionary*, 2nd Ed, 1989

38. Such an approach appears to have been accepted by the New South Wales Court of Appeal[21]. It is consistent with the long standing principle[22] that it is unnecessary for the precise nature or extent of injury to be foreseeable in order for a defendant to be liable in tort, provided that damage of the general nature of that suffered is foreseeable. Further, the language used in subsections (2), (3) and (4), particularly the expression "*something occurring*", is more consistent with the word "*risk*" relating to the manner or mechanism of injury than to the extent of the "*harm*" suffered.

39. In addition, the expression *"harm suffered by another person"* in s.5L is not qualified by reference to the extent or seriousness of the harm: on its face the text of the section applies to both minor and serious injuries.

40. In *Queensland v Kelly*[23] it was the mechanism of the injury, namely, the sand dune unexpectedly giving way under the plaintiff which was not obvious, not the potential for serious injury as distinct from minor injury. In this case, unlike in *Queensland v Kelly*, the surface on which the activity occurred did not unexpectedly change so as to make an apparently harmless activity suddenly dangerous. In addition, this case is not factually analogous to *Queensland v Kelly* because the relative firmness of the jumping pillow was apparent to anyone on it and was constant, whereas the sand dune only appeared to be sufficiently firm to provide adequate support but was not.

41. Thus, whilst it may be that in some factual circumstances the risk of a particular dangerous recreational activity which eventuates may not be an "*obvious risk*" of that recreational activity[24], in a case in which the objective risk which makes the relevant activity a '*dangerous recreational activity*' is the same risk which eventuates, then that injury must be '*as a result of the materialisation of an obvious risk*' of that activity.

42. The facts of this case have some relevant similarity to those which the New South Wales Court of Appeal held were the "*result of the materialisation of an obvious risk*" in *Great Lakes Shire Council v Dederer*[25], in that in both cases the injured plaintiff saw others engaging in the activity without injury and did not subjectively appreciate the risk of serious injury. In *Dederer* a 14 year old boy dived head first from a bridge into an estuary and became quadriplegic as a result of hitting his head on a sandbar. He sued both the local Council and the RTA in negligence and, in answer to the Council's s.5L *CLA* defence, argued that the relevant risk was not obvious on grounds which included that[26]:

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[21] *Streller v Albury City Council* [2013] NSWCA 348, [2013] Aust Torts Reports 82-146 at [29]: *"'risk' refers to the chance or possibility of an occurrence which results in 'harm'* and [32] *"the risk or chance of being injured from impact with the riverbed"; Sharp v Parramatta Council* [2015] NSWCA 260 at [43]

[22] *Hughes v The Lord Advocate* [1963] AC 837

[23] [2014] QCA 27 at [16], [30], [48] (referred to at CA judgment [151]-[155])

[24] See discussion by Ipp JA in *Fallas v Mourlas* [2006] NSWCA 32, (2006) 65 NSWLR 418 at [26]-[28]

[25] [2006] NSWCA 101; (2006) Aust Torts Reports 81-860

[26] At [93]-[100]

(a) he had seen others jump from the bridge over many years without intervention from the council;

(b) he had seen 10 to 15 other people jump from the same spot immediately before taking his dive and saw boats passing through the channel below;

(c) he had jumped from the same spot on the day before his dive without touching the bottom; and

(d) he thought the water looked deep because of its murky green colour[27].

43. In finding for the Council on the application of section 5L[28], Ipp JA said[29]:

> *There is little doubt that Mr Dederer was influenced by the fact that the practice of diving off the bridge had gone on for so long and was being undertaken by children of his own age. The fact that his own peers were taking the risks would have been a challenge to a cocky fourteen year old, as he described himself. This explains, but does not justify, why he deliberately disregarded the pictograph. In my view, however, a reasonable fourteen and a half year old boy should have appreciated that it was highly dangerous to dive as he did. Mr Dederer put himself in a position of great danger by diving in circumstances where the risks were obvious. Had he given the matter any proper thought, he would have appreciated the full extent and nature of the risks.*

44. Similarly, in this case, a reasonable 21 year old in the position of the Respondent who was exercising ordinary perception, intelligence and judgment, and had given the matter any thought, would have considered the risk of both minor and serious injury to be obvious because:

(a) the jumping pillow was "*like a solid surface almost*" and this was plainly observable, as demonstrated not only by Dr Olsen's evidence but also by the photographic evidence;

(b) an inverted manoeuvre necessarily meant that it was possible that the Respondent might land on his head or neck if he did not complete the manoeuvre successfully;

(c) the risk of harm from falling onto one's head or neck from a height of 1 metre or more above the surface of the jumping pillow[30] is a matter of common knowledge;

(d) the harm from the activity was potentially catastrophic;

(e) the Respondent had moments before tried the manoeuvre and had failed to perform it properly, landing awkwardly;

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[27] At [134]
[28] A finding not the subject of the appeal by the RTA in the High Court
[29] At [319]
[30] Exhibit 40 page 19

(f) the Respondent (and another witness) knew that it was dangerous to land on his neck on a trampoline, which, objectively, was a less solid surface than the jumping pillow.

45. As already noted, matters of common knowledge can be obvious risks (s.5F(2)) and it is common knowledge that the consequences of a failed inverted manoeuvre on an 'almost solid surface' are potentially catastrophic.

46. It is irrelevant when determining whether the risk in this case was obvious that the very purpose of the jumping pillow was for people to jump on or that the manufacturer of the jumping pillow or the Appellants promoted it as a means for carrying out inverted manoeuvres. Many sports and recreational activities are attractive because they are dangerous and thus challenging or thrilling. Such sports and activities are often purposely designed to involve physical risks of injury. For example, rugby fields and the rules of rugby, as well as the existence of rugby associations, are intended to facilitate and promote dangerous physical contact. Ski resorts promote their activities with footage of people performing aerial manoeuvres and jumping off cliffs. Skydivers use equipment specifically designed for jumping out of aeroplanes. Equestrians deliberately jump horses over obstacles created to challenge horse and rider, increasing the risk of physical injury if performed badly. That the risk created by participation in the recreational activity arises from the essence of the activity does not preclude that risk being an obvious one within s.5F.

(ii) Duty

47. If s.5L *CLA* does not apply, then the Appellants submit that the scope of the duty of care owed by them to the Respondent did not extend to prohibiting inverted manoeuvres on the jumping pillow or to warning an adult of the risks of performing inverted manoeuvres. Alternatively, if the duty is characterised more broadly, in terms of taking reasonable precautions to avoid foreseeable risks of harm to patrons, then the Appellants contend that, pursuant to s.5B *CLA,* there was no breach in failing to prohibit somersaults and other inverted manoeuvres, which was the precaution found by the primary judge and the Court of Appeal[31].

48. That is because the concept of personal autonomy[32] negates a duty to prohibit a recreational activity enjoyed by many because of a risk that someone might be injured, even seriously. The finding[33] that the Appellants were "*negligent in failing to prohibit back flips or somersaults and other inverted manoeuvres*" is at odds with the *"underlying value of the common law which gives primacy to personal autonomy"*[34], including *"the autonomy*

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[31] Primary judgment [315], CA judgment [65], [162]
[32] *Stewart v Kirkland-Veenstra* [87]-[89] [2009] HCA 15; (2009) 237CLR 215 at [87]; *Agar v Hyde* [2000] HCA 41, (2000) 201 CLR 552 at [90]
[33] Primary Judgment [313], [315]
[34] *Stuart v Kirkland-Veenstra* [2009] HCA 15; (2009) 237 CLR 215 at [87]

of all who choose, for whatever reason, to engage voluntarily in…any…physically dangerous pastime'[35].

49. The issue is not whether the burden on the defendant of such a duty negates imposition of such an obligation but whether the burden on the public generally of the prohibition of a recreational activity enjoyed by many who wish to continue to enjoy, voluntarily, the challenge and thrill of engaging in a potentially dangerous activity militates against imposing such an obligation.

50. In that regard, the Respondent was an adult with no physical or cognitive disability; he was not in a special relationship with the Appellants, such as employer and employee or teacher and student; all the patrons, including the Respondent, attended the Appellants' premises voluntarily; the particular activity of inverted manoeuvres was not compulsory for those using the jumping pillow; the Respondent was deliberately attempting to perform an inverted manoeuvre; there was no hidden hazard or trap or complex equipment involved; the physical characteristics of the jumping pillow were apparent to all, including the Respondent, who had used it a number of times before attempting a backward somersault; and there was no defect in or damage to the jumping pillow: it 'performed' as it was designed and constructed to do.

51. As Lord Hoffmann observed[36], it is rare for an occupier to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake and, whilst an occupier may for his own reasons wish to prohibit such activities and is entitled to prohibit such activities on his premises, the law does not require him to do so.

52. Further, a plaintiff cannot take advantage of a duty of care owed to a class of persons of which the plaintiff is not a member[37]. Thus, the Respondent, contrary to what may be implicit in the reasons of Walmsley AJ on the issue of breach[38], cannot rely on a breach of a duty owed to a child.

53. In this case, the factual circumstances that the manufacturer/distributor of the jumping pillow, for reasons not disclosed in the evidence, but apparently, given the reference to insurers and lawyers, because of a fear of litigation, chose to recommend prohibiting somersaults is either irrelevant or of little weight in determining whether the Appellants owed a duty of care to the Respondent to prohibit voluntary somersaults and other inverted manoeuvres on the jumping pillow. In that regard, the correspondence from the manufacturer/distributor said nothing about catastrophic injury and the Respondent, on the findings below, ought to have been aware himself of the risk of less serious injury from inverted manoeuvres.

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[35] *Agar v Hyde* [2000] HCA 41; (2000) 201 CLR 552 at [90]
[36] *Tomlinson v Congleton Borough Council* [2003] UKHL 47, [2004] 1 AC 46 at [45]
[37] *Ashrafi Persian Trading Co Pty Ltd v Ashrafinia* [2001] NSWCA 243 at [76]-[77]
[38] CA judgment [145(d)-(e)]

54. If an occupier is under a duty to prohibit activities which provide enjoyment to entrants but are nevertheless potentially catastrophically risky, then, for example, occupiers of playing fields ought to prohibit contact sports lest an injury occur even within the rules; occupiers of beaches ought to prohibit surfing lest a surfer be dumped on the head by a rogue wave; and occupiers of ski resorts ought to close challenging runs.

55. Accordingly, the Court of Appeal erred in finding that the Appellants owed a duty of care extending to prohibiting an activity which, although risky, provided an enjoyable, challenging and thrilling recreational activity to many people.

56. Further, for the reasons submitted above in respect to s.5L *CLA*, the risk of a neck injury, whether minor or serious, from performing backflips on the jumping pillow was an "*obvious risk*" within the meaning of s.5F *CLA* with the result that, pursuant to s.5H *CLA,* the scope and content of the duty of care owed by the Appellants to the Respondent did not extend to warning the Respondent of the risk of performing backflips or somersaults or other inverted manoeuvres on the jumping pillow.

(iii) Breach

57. Alternatively, the Court of Appeal erred in finding that there was a breach of duty, in the circumstances identified in [50] and [53] above, because the Appellants did not prohibit somersaults on the jumping pillow or warn of the risks involved.

58. Although consideration of the issue of breach in this case is conceptually very similar to the issue of duty, determination of the breach issues requires attention to the statutory prescriptions in s.5B *CLA*. In that regard, when considering whether "*a reasonable person in the [Appellants'] position would have taken [the] precautions*" of prohibiting somersaults, the Court of Appeal failed to give due regard to *"the social utility of the activity that creates the risk of harm"*[39] and to recognise that the relevant *"burden of taking precautions to avoid the risk of harm"*[40] fell on other patrons who would be precluded from engaging in an activity which they enjoyed, not on the Appellants.

59. The starting point is that the duty of care owed by an occupier is to take reasonable care to avoid reasonably foreseeable risks of harm to an entrant *taking reasonable care for his or her own safety*[41], which includes the entrant making reasonable choices about engaging in an activity requiring skill or expertise. Further, the duty is not to *prevent* harm occurring, nor to

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[39] s.5B(2)(d) *CLA*
[40] s.5B(2)(c) *CLA*
[41] *Australian Safeway Stores Pty Ltd v Zaluzna* (1987)162 CLR 479 at 488; *Roads and Traffic Authority v Dederer* at [45]; *Clarke v Coleambally Ski Club* [2004] NSWCA 376 at [26]-[33]; *Reid v Commercial Club (Albury) Ltd* [2014] NSWCA 98 at [159]-[160]

eliminate all foreseeable risks[42]. As Gleeson CJ succinctly said in *Swain v Waverley Municipal Council*[43] "*the measure of careful behaviour is reasonableness, not elimination of risk*".

60. Secondly, the failure to eliminate a risk which was foreseeable and preventable does not necessarily amount to negligence[44]. Doing nothing is always one potentially available response to a foreseeable risk of harm[45]. This remains the position under the *CLA*[46].

61. Thirdly, a plaintiff cannot take advantage of precautions required for a class of persons of which the plaintiff is not a member[47]. In this case, the Respondent, as an adult, with no physical or cognitive deficits, cannot rely on, for example, precautions reasonably required for small children or for the intellectually disabled.

62. Fourthly, it is insufficient, as the primary judge apparently did[48], to merely compare the cost of a warning sign with the 'cost' of the catastrophic injury which eventuated[49].

63. Fifthly, if there was an "*obvious risk*" within the meaning of s.5F *CLA*, then, as noted above, pursuant to s.5G, the Respondent is *"presumed to have been aware of the risk of harm…if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk"*. Thus the reasoning in the courts below concerning the distinction between minor harm and a serious injury in relation to s.5L has no application to s.5G(1), because s.5G(2) applies, so that the Respondent is deemed to be aware of the risk of serious injury for the purposes of applying s.5B, the Respondent not having proved that he was not aware of that risk.

64. Sixthly, the common law recognizes, in relation to both duty and breach, the autonomy of the individual in society to decide to voluntarily engage in conduct which may be harmful. In terms of breach, requiring a citizen to prohibit conduct and, presumably, enforce that prohibition, particularly when the State has not chosen to prohibit such conduct, is, as already submitted, "*a significant departure from an underlying value of the common law which gives primacy to personal autonomy*"[50] and "*the paramount consideration that a person is entitled to make his own decisions about his life*"[51], so that "*expressed in the most general way, the value described as personal*

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[42] *Roads and Traffic Authority v Dederer* at [53]-[54]; *Vairy v Wyong Shire Council* at [79], [118]; *Neindorf v Junkovic* (2005) 222 ALR 631at [95]-[97]
[43] (2005) 220 CLR 517 at [5]
[44] *Tame v State of New South Wales* (2002) 211 CLR 317 at [99] per McHugh J
[45] *Vairy* at [124], [155-156] per Hayne J
[46] *Shaw v Thomas* [2010] NSWCA 169 at [45]
[47] *Ashrafi Persian Trading Co Pty Ltd v Ashrafinia* [2001] NSWCA 243 at [76]-[77]; *Agar v Hyde* at [91]
[48] Judgment [313]
[49] *Vairy* at [8]
[50] *Stuart v Kirkland-Veenstra* at [87]
[51] *Rogers v Whitaker* 175 CLR 479 at [487]

autonomy leaves it to the individual to decide whether to engage in conduct that may cause that individual harm"[52].

65. Seventhly, even if, contrary to the Appellants' submissions, the reasonably foreseeable objective (and subjective to the Respondent) risk of engaging in inverted manoeuvres was only of suffering minor injury, the concept of autonomy nevertheless applies to the enquiry into breach because the injury suffered was not of a completely different type and kind[53].

66. It is in the context of those propositions that the application of s.5B *CLA* must be considered in the factual circumstances of this case. That is, each of these matters falls within the expression "*other relevant things*" in s.5B(2).

67. The first step in considering s.5B is to identify the "*risk of harm*". The primary judge correctly identified the risk of harm as being from "*attempting somersaults and other inverted manoeuvres on the jumping pillow*"[54].

68. The Appellants accept, consistently with their submissions above on 'obvious risk', that on their case the risk of harm was 'foreseeable' and 'not insignificant' for the purposes of s.5B(1)(a) and (b), although the probability of harm occurring was very low.

69. However, for the same reasons identified above in the submissions on duty, the Appellants submit that the courts below erred in finding[55] that s.5B(1)(c) required that the Appellants take precautions "*by prohibiting the performance of somersaults and other inverted manoeuvres on the pillow*" by "*placing signs to that effect*".

70. Further, whilst the 'recommendation' given by the manufacturer of the jumping pillow to prohibit somersaults and other inverted manoeuvres is relevant to the issue of foreseeability for the purposes of s.5B(1)(a), which was not contentious, it is not probative on the issue of precautions within the meaning of s.5B(1)(c) for the following reasons.

71. First, there was no evidence as to why the manufacturer made the recommendation when it did; whether the recommendation was intended to apply to adults; what legal system the manufacturer operated within; or who were the "*OH&S Consultants*" referred to in the letter from Jumping Pillows at AB 472.

72. Secondly, by analogy to Australian Standards, a 'recommendation' by a manufacturer can only, at most, be indicative, not determinative, of breach of a tort duty[56]. In *Perrin v Bleasel*[57], the argument that the manufacturer's

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[52] *Stuart v Kirkland-Veenstra* at [89], citing *Agar v Hyde* at [88]-[90]
[53] *Hughes v The Lord Advocate* [1963] AC 837
[54] Judgment [310]
[55] Judgment [313], [315]
[56] *Jones v Bartlett* (2000) 205 CLR 166 at [110]; *Leighton Contractors Pty Ltd v Fox* (2009) 240 CLR 1 at [49]; *Francis v Lewis* [2003] NSWCA 152 at [42] – [43]; *Chico v The Corporation of the*

warning about the drug Myodil established that the defendant doctor was in breach of his duty of care in administering the drug was rejected. If the manufacturer's recommendation concerns, for example, an obscure danger in the use of equipment, that would no doubt be given greater weight, but that is not this case.

73. As to s.5B(2), the "*probability that harm would occur*" was very low, as demonstrated by the absence of any incidents of previous injury either at the Appellants' premises or at the other venues referred to in the evidence which did not prohibit inverted manoeuvres. There was "*social utility*" in a recreational activity which was challenging but not compulsory. Prohibition of aerial manoeuvres necessarily would extend even to those adults who were experienced and who could skillfully perform the manoeuvres.

74. The Appellants submit that, both at common law and pursuant to s.5B read with s.5H, there is no breach of duty in failing to warn of the risk of injury from inverted manoeuvres on the jumping pillow.

75. Further, the Appellants submit that the scope of the duty of care owed to adult entrants does not require, as a reasonable precaution pursuant to s.5B(1)(c), the prohibition of adults performing inverted manoeuvres on the jumping pillow.

76. These submissions are consistent with the evidence of the conduct of other operators of centres where there were jumping pillows in use. The evidence was that the operators of the centre where Mr Bahnsen performed backflips did not prohibit backflips or somersaults or install warning signs[58] and the operators of the centre where Mr McKeown performed backflips also did not prohibit that activity[59].

77. Accordingly, in the circumstances of this case, either the scope of the duty owed by the Appellants did not extend to prohibition of or warning against inverted manoeuvres or, alternatively, it was not necessary for the Appellants, in the discharge of their duty, to prohibit adults like the Respondent from voluntarily performing inverted manoeuvres or to warn them of the obvious – that performing inverted manoeuvres was risky.

Part VII: Applicable statutory provisions

78. *Civil Liability Act, 2002 (NSW)* ss. 5B, 5F, 5K and 5L (annexed)

PART VIII: Orders sought

79. Appeal allowed.

City of Woodville (1990) Aust Torts Reports ¶81-028 at 67,895; 67,897; *Garzo v Liverpool/Campbelltown Christian School* [2012] NSWCA 151 at [21], [136(iv)]

[57] Supreme Court of New South Wales, McInerney J, unreported, 15 July 1998, page 51,

[58] T258.14-18

[59] T305.10

80. Set aside the orders of the Supreme Court of the Australian Capital Territory made on 21 February 2015 and, in lieu thereof, Statement of Claim dismissed.

81. Order that the Appellants pay the Respondent's costs of this appeal and of the proceedings below.

PART IX: Oral argument

10 82. The Appellants estimate that two hours will be required to present oral argument.

Dated: 16 October 2015

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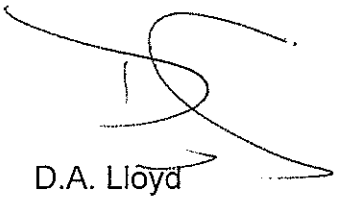
J.E. Sexton
Senior Counsel for the Appellants



30 D.A. Lloyd
Counsel for the Appellants

Civil Liability Act 2002 No 22

5B General principles

(1) A person is not negligent in failing to take precautions against a risk of harm unless:

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

(b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

(d) the social utility of the activity that creates the risk of harm.

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Civil Liability Act 2002 No 22

5F Meaning of "obvious risk"

(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.

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Civil Liability Act 2002 No 22

5G Injured persons presumed to be aware of obvious risks

(1) In proceedings relating to liability for negligence, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.

(2) For the purposes of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

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Civil Liability Act 2002 No 22

5H No proactive duty to warn of obvious risk

(1) A person (***the defendant***) does not owe a duty of care to another person (***the plaintiff***) to warn of an obvious risk to the plaintiff.

(2) This section does not apply if:

(a) the plaintiff has requested advice or information about the risk from the defendant, or

(b) the defendant is required by a written law to warn the plaintiff of the risk, or

(c) the defendant is a professional and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service by the defendant.

(3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

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Civil Liability Act 2002 No 22

5K Definitions

In this Division:

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

obvious risk has the same meaning as it has in Division 4.

recreational activity includes:

(a) any sport (whether or not the sport is an organised activity), and

(b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and

(c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

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Civil Liability Act 2002 No 22

5L No liability for harm suffered from obvious risks of dangerous recreational activities

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

(2) This section applies whether or not the plaintiff was aware of the risk.

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