STEWART & ORS v ACKLAND (C12/2015)

Court appealed from: Supreme Court of the Australian Capital Territory, Court of Appeal [2015] ACTCA 1

Date of judgment: 12 February 2015

Special leave granted: 11 September 2015

On 10 October 2009 Mr Benjamin Ackland, then 21 years old, visited an amusement park with a group of fellow university students. There Mr Ackland used a jumping pillow. After obtaining advice from colleagues who were also using the device, Mr Ackland twice attempted to perform a backwards somersault. On the second attempt he landed awkwardly on his head, causing a broken neck and permanent quadriplegia.

Contrary to a recommendation contained in the owners' manual for the jumping pillow ("the Manual"), the amusement park's owners had not placed a sign on or near the device prohibiting somersaults or inverted manoeuvres. The Manual had been received by the parks' owners under cover of a circular which requested the recipient to read the Manual carefully, especially the chapter on safety (which contained the signage recommendation). The owners also took no other measures to prohibit, or to warn users of the danger of, backwards somersaults. Mr Ackland then sued the owners of the park, the Appellants, in negligence.

On 21 February 2014 Burns J awarded Mr Ackland damages of more than $4.6 million, after finding that the Appellants had been negligent both by failing to warn of the risk of serious neck injury and by failing to prohibit backwards somersaults. His Honour found that Mr Ackland had engaged in a "dangerous recreational activity" as defined in s 5K of the *Civil Liability Act* 2002 (NSW) ("the Act"). Burns J also found however that the harm suffered by Mr Ackland had not resulted from the materialisation of an "obvious risk" within the meaning of s 5F of the Act, with the result that the defence raised by the Appellants under s 5L had not been made out.

The Court of Appeal (Penfold J, Walmsley and Robinson AJJ) unanimously dismissed an appeal by the Appellants. Walmsley and Robinson AJJ held that Burns J, by finding that there was an obvious risk of minor injury but not of serious injury, had not erred in respect of "obvious risk". This was partly because the relevant risk for the purpose of s 5L is one that has come home rather than one which has not. Walmsley and Robinson AJJ found that a reasonable person in the Appellants' position would have construed the safety recommendations contained in the Manual as a warning in the interests of customers' safety. Such a person would have warned users not to do somersaults and would have prohibited somersaults on the jumping pillow. Penfold J held that, for the purpose of s 5L of the Act, "obvious risk" did not arise for consideration. This was because Burns J, by failing to consider the risk of harm prospectively, had erred by finding that Mr Ackland had engaged in a "dangerous recreational activity" at all. Penfold J also held that Burns J had not erred in respect of the Appellants' negligent failure both to warn and to prohibit.

The grounds of appeal include:

- The Court of Appeal erred in failing to find that the injuries suffered by Mr Ackland were as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by Mr Ackland within the meaning of s 5L of the Act.

- The Court of Appeal erred in failing to find that there was an obvious risk, within the meaning of s 5F of the Act, of serious injury in performing a backwards somersault on a jumping pillow.

On 5 November 2015 Mr Ackland filed a summons in which he sought leave to rely on a proposed notice of contention filed out of time. The ground of that proposed notice of contention is:

- The ACT Court of Appeal erroneously found that the recreational activity engaged in by Mr Ackland was properly characterised as a "dangerous recreational activity".