IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S321 of 2011

BETWEEN:

MADELEINE LOUISE SWEENEY BHNF NORMA BELL

Appellant

and

ANDREW JOHN THORNTON

Respondent

APPELLANT'S SUBMISSIONS

Part I: [certification that the submission is in a form suitable for publication on the internet]

1. The appellant certifies that this document is in a form suitable for publication on the internet.

Part II: [a concise statement of the issues the appellant contends that the appeal presents]

2. Whether the Court of Appeal's finding that negligence had not been established was the result of its error as to the statement of, and findings as to:

   a. the content of the duty of care;

   b. breach of duty of care; and

   c. causation,

   in the particular circumstances of the appellant learner driver's claim against the respondent supervising driver.

3. Whether the Court of Appeal erred in its unjustified limitation of the effect of the respondent's admission on the content of his duty of care to the appellant.

4. Whether the Court of Appeal erred in its factual findings by failing to consider and give proper evidential effect:

   a. in preferring the inexact and conflicting evidence of forensic accident reconstruction experts to the unchallenged eyewitness evidence of

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Ms Fancourt who had thorough knowledge of and experience in driving around the bend where the accident occurred;

b. to the eyewitness evidence of Ms Fancourt that when she first saw the vehicle halfway around the bend '*it looked to be travelling too fast to take the bend*';

c. to the evidence in relation to whether the vehicle was under acceleration between losing control and starting to yaw, particularly as that impacted the finding as to the speed of the vehicle at the time of the loss of control;

d. to the failure of the respondent to give oral evidence where he was one of only two eyewitnesses and differed (in his statement before the Court) in material respects from the sworn evidence of Ms Fancourt and other evidence; and

e. to the fact that once the respondent's case that the irregularities in the road surface were a cause of the accident was rejected, the only proper and available inference was that speed on a wet road coupled with the inexperience of the driver caused the accident.

Part III: [certification that the appellant has considered whether any notice should be given in compliance with s.78B of the *Judiciary Act* 1903 (Cth)]

5. The appellant certifies that it considers that no notice is required under s.78B of the *Judiciary Act* 1983 (Cth).

Part IV: [citation of reasons of the primary and intermediate court in the case]

6. The reasons of the New South Wales Court of Appeal have not been reported in an authorised report, and the medium neutral citation is *Thorton v Sweeney* [2011] NSWCA 244. The reasons of the Supreme Court of New South Wales have not been reported in an authorised report, and the medium neutral citation is *Sweeney v Thorton* [2010] NSWSC 1030.

Part V: [narrative statement of facts]

7. The appellant obtained her '*learner licence*' pursuant to the Road Transport (Driver Licensing) Regulation 1999 (NSW) soon after her sixteenth birthday in February 2005 (CA [12]). A person holding a provisional learner's permit was at that time required to undertake 50 hours (now 120 hours) of driving under the supervision of a licensed driver.

8. Between February 2005 and the accident – at which time the appellant was 16½ years old (CA [5]) – the appellant had driven under the supervision of a licensed driver for a total of about 28 hours (CA [12]), including 2 to 3 hours driving while being supervised by the respondent within a 12 hour period prior to the accident (CA [12]). The appellant's driving experience included five or six sessions ('*lessons*') under her father's supervision, the most recent of which had been 2 or 3 weeks prior to the accident (CA [12]).

9. The respondent had turned 21 years of age in July 2005 (CA [5]) and held an unrestricted driver's licence (CA [5]). The respondent's vehicle was a 1991 Toyota Camry automatic station wagon (CA [4]).

10. At the time of the accident at about 1.15pm on 27 August 2005 (CA [4]) the respondent was – as the licensed driver for the purposes of the Regulation – supervising the appellant (CA [4]) in the driving of the respondent's vehicle in an easterly direction approaching and through a bend on Wallanbah Road, between the towns of Tuncurry and Firefly, New South Wales (CA [4]). It was not raining at the time, but the road was damp or wet (CA [4]), with one official meteorological site 5.2kms from the accident location recording 0.8mm of rain in the 24 hours to 9 am on 28 August 2005 and another similarly distanced showing no rainfall (CA [25]).

11. The road was a typical secondary rural road (CA [14]) and was relatively flat and open with an average width of 6.2m to 6.5m sufficient for single lane of traffic in each direction (CA [14]). The road had no marked centre line (CA [14]). At a point about 1.2kms west of the town Dyers Crossing, the respondent's vehicle left the roadway and collided with a tree (CA [17]), causing the appellant to suffer catastrophic brain injury. The appellant's injuries also had the result that the appellant had no recollection of the accident or the events preceding it (CA [27]).

12. The accident location was a section of curved road. For vehicles travelling the direction of the respondent's vehicle (east) a left hand steering input was required to negotiate the bend (CA [19]). The bend was 70m in length and had a curve radius of 190m (CA [19]). The bend had a short relatively straight first transition section, a second central section of 45m at a constant radius of 190m, and third relatively straight transition section leading out of the bend (CA [19]).

13. The apex was halfway around the bend, 35m from the commencement (CA [20]). At 13m east of the apex of the apex (22m west of the end of the bend) there was a slight irregularity on the road surface caused by maintenance or construction work of a drain under the road (CA [20]). An aide-memoire setting out these measurements is reproduced at CA [23].

14. The irregularity on the road surface was neither significant nor hazardous and would have been experienced, if at all, as a slight bump transmitting vibration through the respondent's vehicle's suspension (CA [20]). It was not severe enough for the surface of the tyre to leave the road surface, but it had the potential to generate slip and, if that occurred, it would be experienced as the rear of the vehicle moving very slightly to the right, and it would occur close the exit spiral of the bend (where the curve radius flattened out) (CA [21]). A vehicle travelling between 70kph and 80kph would cover the irregularity in 5/100 of a second (CA [21]).

15. The respondent's statement (Exhibit E) said that first '*As she came out of the corner I felt the back of the car move out very slightly to the right*' and then he saw the appellant attempt steering to correct the movement but she '*turned the steering wheel too much to the right*' and '*the car started to overcorrect*' and she '*started to turn the steering to the left again*' and then, after passing an oncoming vehicle (Ms Fancourt), he said that he saw the appellant '*accidentally*' press the accelerator '*straight to the floor quite quickly*'.

16. The respondent's retained accident reconstruction expert (Mr Keramidas) confirmed that the application of acceleration described by the respondent in his statement (Exhibit E) occurred virtually at the start of the yaw (sideslip tyre marks) (T398.30-49) and the 'yaw' was 78m from the irregularity and 91m from the apex of the bend (see paragraph 19 below).

17. Ms Fancourt first saw the vehicle at the apex of the bend (see paragraph 21 below) and it was then out of control and '*fishtailing*' (moving from side to side). She saw the appellant '*steering madly*' and demonstrated the motion of the appellant moving the steering wheel first one way and then the other.

18. As the appellant was the holder of a provisional learner's permit she was limited to a speed of 80km/h (CA [18]). The prescribed speed limit for the road at the accident location was 100km/h (CA [18]).

19. Some tyre markings ('*yaw*' mark) were deposited onto the road surface. The yaw mark commenced 56m to the east of the end of the bend, which was 78m from the surface irregularity, and the yaw mark had a radius of 63m (CA [22]). As a matter of calculation, the yaw mark suggested an average speed through the distance of the yaw mark of 70km/h (CA [22]), but that calculation said nothing of the actual speed at various stages before and through the yaw mark. Importantly, the speed through the yaw mark did not equate to the speed of travel prior to the yaw mark and through the bend. Expert opinion could not (because of the lack of data) calculate the speed prior to the yaw mark. The expert evidence was that the '*fishtailing*' that preceded the yaw would have had the effect of '*washing off*' speed in the absence of acceleration, but that might not apply if there was '*acceleration*' during the '*fishtailing*' (TJ [78], [79] and [80]). The only direct evidence of acceleration was the single episode described in the respondent's statement (Exhibit E), and that occurred at about the commencement of the yaw (see paragraph 16 above). Mr Keramidas said in his evidence that the increasingly exaggerated nature of the '*fishtailing*' observed indicated acceleration (T319.20-31; 396.23-39), but said inconsistently in the joint report (which he had prepared for both experts) that the same matters were the result of additional steering overcorrections rather than relating to the application of full throttle part-way through (Exhibit C, page 12 (Blue 290) (reproduced in CA [35], question 16 answer)).

20. When the respondent's vehicle was in the position indicated by the yaw marks, the vehicle had a slip angle of 11 degrees to the left such that there was no realistic prospect of a learner driver recovering control of the vehicle (CA [22]). The yaw marks indicated a left steering input, but did not indicate whether or not it was a continuation of the left steering input required to negotiate the bend (CA [25]).

21. A passenger (Ms Taylor) had no recall of the driving sequence prior to the accident (CA [27]) and the respondent was not called as a witness at the trial (CA [28]). A statement of the respondent dated 21 September 2005 given to the police was tendered as part of the appellant's case (Exhibit E, CA [28]).

22. An eyewitness (Ms Fancourt) gave evidence at the trial. In evidence in chief Ms Fancourt said that when she first saw the respondent's vehicle '*it was fishtailing*'

(T109.2) and the driver was '*steering madly*' (T109.35), that she '*estimated*' the speed '*would be roughly about 80*' (T110.8) and '*as soon as I saw it I realised that it was out of control*' (T110.18). Ms Fancourt was cross-examined to confirm the vehicle was '*fishtailing*' while maintaining a '*fairly constant*' speed (T113.30-114.14) and to confirm that the use of '*roughly*' to describe the speed was not '*endeavouring to be precise*' and she could not be '*certain*' as to the speed (T114.15-23). Ms Fancourt also provided a statement to the police dated 7 September 2005 (Exhibit F) which said: '*To me it looked to be travelling to fast to take the bend* [this statement was unchallenged: TJ [72]]. *I couldn't estimate what speed it was doing other than to say it looked like around 80 kilometers per hour*' and '*As soon as I saw the car I could tell it wasn't under control. The car was swerving from side to side in sort of a fishtailing movement*'. Ms Fancourt's descriptions related to her observations of the vehicle commencing '*halfway*' around the bend (T109.25).

23. Accident reconstruction opinion evidence was before the Court. Mr Johnston (retained by the appellant) and Mr Keramidas (retained by the respondent) produced a joint report (Exhibit C, Blue 280). As a result of uncertainty as to what assumptions could be made about vehicle control through the bend, the experts could not perform a calculation of the speed on entry to the bend, and the calculation of the speed on exit (less than or equal to 70km/h, with an upper range of 90km/h if braking was involved) was done on the assumption that the vehicle was under constant acceleration or coasting through the bend (Exhibit C, page 1 (Blue 282) (reproduced in CA [35], question 1 answer)). Similarly, the experts could not perform a calculation of the speed of the vehicle at the commencement of the yaw tyre mark, its average over the distance of the yaw tyre mark or at the end of the yaw tyre mark, and the '*most useful advice*' they could provide was that the average speed through the course of the yaw was '*about*' 70km/h and it assumed that the vehicle was under '*full throttle*' which '*would be counteracting*' the slowing of the vehicle caused by the formation of the yaw mark (Exhibit C, page 10 (Blue 289) (reproduced in CA [35], question 14 answer)).

24. The important question was the speed immediately prior to the loss of control and expert opinion did not assist. The respondent's case was that acceleration after the slip on the bend explained why the average speed through the course of the yaw marks (70km/h) was the probable speed through the bend because the acceleration prevented the wash-off of speed caused by the '*fishtailing*' and yaw, but the respondent's statement was the only direct evidence of acceleration and it described a single episode of acceleration after the slip and after Ms Fancourt's vehicle had been passed (see paragraph 15 above). Moreover, the expert's calculation of the average speed through the yaw itself assumed that the vehicle was under '*full throttle*' so as to '*counteract*' the slowing caused by the formation of the yaw mark (Exhibit C, page 10 (Blue 289) (reproduced in CA [35], question 14 answer)).

25. Against that limited background, Mr Keramidas thought a speed of 70km/h was safe and reasonable in all the circumstances for the curve geometry for experienced and inexperienced drivers (CA [35]). Mr Johnston thought it was safe and reasonable for experienced drivers in wet and dry conditions, but was approaching the comfort threshold for experienced drivers in wet conditions (CA [35]) and thought for inexperienced drivers the wet conditions provided no contingency for the learner driver to accommodate the steering and speed adjustments a learner driver is likely to

attempt in negotiating such a curve (an experienced driver would drive the curve as a smooth arc at a constant speed and an inexperienced driver is likely to make several braking and steering adjustments, which when coupled with a speed close to the comfort limit leave no contingency for the additional actions to be safely undertaken, and limits the opportunity for instruction during the bend) (CA [35]).

26. Before the accident the appellant had driven the respondent's vehicle under his supervision. On Saturday 27 August 2005 between 1am and 3am the appellant drove the respondent about 35kms over a period of about hour from Tuncurry to Firefly (CA [13]) to collect the respondent's girlfriend and then the return journey (CA [15]). The respondent had, according to the evidence of the appellant's boyfriend (Mr Gordon), asked the appellant to drive because he had '*had a few drinks*' and he wanted to see his girlfriend (T31.5-10). The respondent and his girlfriend stayed awake to watch the sunrise and there is no evidence of what they then did until leaving on the second trip to Firefly. The appellant spent the remainder of the night at her boyfriend's flat (CA [15]). At about 11.30am on Saturday morning the journey from Tuncurry to Firefly was repeated with Ms Taylor as a passenger (CA [17]) and the accident occurred on the way back to Tuncurry (CA [17]).

27. At the time of the accident the appellant was not a competent learner driver. The appellant's father gave evidence that she was '*looking down at the speedometer a lot*' (T68.10), '*had problems regulating her speed*' (T68.16), '*was never at the point where she could drive more than 60 km/h*' (T68.50 and 71.2), '*misjudged corners*' (T69.22), '*had problems judging stopping and stopping for corners*' (T69.45), '*tended to brake at the last minute*' (T70.2), '*needed instructions to slow and stop*' (T71.6) and '*needed cues to stay in her lane*' (T71.12 and 76.45). He had experience recent to the accident of driving on the Wallanbah Road and was firm in his view that his daughter did not have the skills and experience necessary to drive on it in dry or wet conditions (T72.40-76.40). Ms Cassar had taken the appellant for a '*lesson*' in the last week of May or first week of June 2005 for about 90 minutes at a partially complete housing estate with minimal residents and described her driving '*to be of a low standard*': she was '*constantly driving slowly, she would rarely get over 40kph and she would often look at the gear stick when changing gears rather than looking at the road*' (Exhibit O). Ms Taylor's statement (Exhibit F) said that the respondent on the return journey in the early hours of Saturday morning '*would instruct [the appellant] what to do*' and '*occasionally he'd say to her to watch her speed*' and '*say when to pull up the car for stopping at intersections*'. The respondent's statement (Exhibit E) said that when on the highway he '*recall[ed] she braked a bit hard at one point and I just told her to be a bit lighter on the pedal*'.

28. None of the evidence suggesting that the appellant had limited driving competency was referred to in the Court of Appeal's reasons, but at CA [121] the Court of Appeal referred to the untested assertion of the respondent in regard to the appellant's driving skills that she '*knew what she was doing*'.

29. The respondent admitted in his defence (Red 25.W, paragraph 5(a)) that he was the '*instructor*' of the appellant. Before the Trial Judge the respondent admitted in final submissions that the scope and content of the duty of care of the appellant (as distinct from a professional instructor supervisor of a learner driver) included in '*discharging the [respondent's] statutory duty as a casual supervisor he was required to instruct,*

guide and direct the [appellant] as to the manner of driving as determined by him [the respondent] to be necessary, from time to time, during the period of supervision' (CA [37] and TJ [6]; see also the respondent's submissions to the Trial Judge (T421.3-11 and the respondent's written submissions to the Trial Judge, paragraph 3.11).

30. Clause 12(5) of the Regulation provided that the respondent (as '*a person accompanying a learner in a vehicle being driven by the learner on a road or road related area*') '*must*' '*(a) supervise the learner with respect to the driving of the vehicle*' '*and*' '*(b) take all reasonable precautions to prevent a contravention of the road transport legislation within the meaning of the Road Transport (General) Act 1999*' (CA [102]).

Part VI: [argument]

31. Duty of care: The Court of Appeal said that the content of the duty of care owed by the respondent '*is informed*' by cl 12 of the Regulation, and set out cll 12(5)(a) and (b) (CA [102]). While the effect of a statutory regime is not decisive as to the question of the duty of care and the development of the common law looks to whether there is consistent pattern of legislative policy to which the common law can adapt itself: *Imbree v McNeilly* (2008) 236 CLR 510, [64], the Court of Appeal erred by using cl 12(5)(b) incorrectly to limit the prospective inquiry as to the content of the duty of care.

32. The roles of cl1 12(5)(a) and (b) in informing the content of the duty of care are different. Clause 12(5)(a) is directed toward the supervision of the learner driver '*with respect to the driving of the vehicle*', and cl 12(5)(b) is directed toward observance of road rules. It is clear that the Regulation must require materially more than that a learner driver be accompanied by a licensed driver for the purposes of compliance with cl 12(5), and that the obligation imposed by cl 12(5)(a) is directed toward matters of instruction, guidance and direction in the safe and proper control of the vehicle as admitted by the respondent. This is reinforced by the requirement that a learner driver undertake 50 hours (now 120 hours) of driving supervised by licensed drivers.

33. The obligation imposed by cl 12(5)(b) is also directed to the safe and proper control of the vehicle: compliance with road rules is an important aspect of accident and injury prevention and many road rules are concerned with the safety and the safe movement of vehicles on the road, but it is in aid of cl 12(5)(a) rather than the reverse. The general duty must be found in cl 12(5)(a) because all that is required in cl 12(5)(b) is covered in cl 12(5)(a), but there could be many matters going to safe driving which are not the subject of road transport legislation. For instance, there is no legislation requiring that the steering wheel be held with a particular degree of tightness, but holding the wheel either too tightly or too loosely might well cause loss of control of the vehicle. Again, there is no legislation which requires that a driver must slow down on a wet road, but it is plainly a matter which would need to be imparted to a learner who did not know it and if a supervisor did not do so he or she would be in breach of cl 12(5)(a). In both the instances given the learner could not be guilty of negligent driving without knowledge of or instruction on the fact.

34. The Court of Appeal's statement of the '*general principles*' '*in relation to the duty of care owed to a learner driver by a voluntary supervisor*' (CA [113]) did not make

reference at all to cl 12(5)(a). This was a significant error in the Court of Appeal's consideration of the statutory regime and its impact on the content of the duty of care.

35. The Court of Appeal's use of cl 12(5)(b) is incorrect. The Court of Appeal stated: '*although the question of reasonableness depends on the circumstances it is a material factor that the Licencing Regulation, cl 12(5)(b), requires the supervisor to take reasonable precautions to prevent the learner driver contravening the road transport legislation*' (CA [113]). It is submitted that that reading of cl 12(5) had the effect of limiting the duties of the supervisor to ensuring compliance with the road transport legislation, whereas that is insufficient to ensure the proper education and safety of the learner as is pointed out above. Indeed the primary error of the Court of Appeal arose, it is submitted, from a certain complacency as to the fact that no identifiable legislated road rule had been contravened in the accident circumstances (CA [118]).

36. The consequence of the incorrect use of cl 12(5) is that the prospective inquiry as to duty and breach failed in this case. The correct content of the duty of care extended to matters of instruction, guidance and direction relating to the safe and proper control of the vehicle. The absence of mechanisms of dual vehicle control operable by the supervising driver and the limited ability of the supervising driver to intervene in the control of the vehicle (compare the situation of an instructor with access to those items discussed in *Chang v Chang* (1974) 48 ALJR 362) would require a supervising driver to be proactive and alert to a need for his or her action. That would be particularly the case if the supervisor was familiar with the road and the learner was not, which may have been the case here. Ms Taylor was the respondent's girlfriend and lived at Firefly. Any trip by the respondent to visit Ms Taylor would have taken in the bend on which the accident happened. The respondent said nothing in his statement about his familiarity with the bend and did not give evidence. In those circumstances the Court of Appeal should have been ready to infer that he was in a position of advantage compared with the appellant concerning knowledge of any danger or difficulty with the bend: *De Gioa v Darling Island Stevedoring & Lighterage Co Ltd* (1942) 42 SR(NSW) 1, 4.

37. Breach of duty of care: The Court of Appeal said that '*the critical question*' '*is whether in the circumstances a reasonable person in the [respondent's] position as a voluntary supervisor would have instructed or guided the [appellant] to enter the bend at a speed lower*' than that accepted by the Court of Appeal as the safe speed (70km/h) (CA [117]).

38. The Court of Appeal answered that question in the negative (CA [133]). The respondent himself did not explain the basis of his nil response to the foreseeable risk of injury.

39. Leaving aside the evidence of Mr Johnston and Mr Keramidas (which presented contrary opinions to that question (see paragraph 25 above) the Court of Appeal referred to: *(a)* 70km/h being 10km/h less than the appellant's speed limit of 80km/h, and 30km/h less than the open road 100km/h speed limit (CA [118]); *(b)* the appellant's driving of the vehicle did not contravene the road rules (CA [118]); *(c)* no evidence as to advisory or warning signs (CA [119]); *(d)* no evidence that the respondent had an appreciation of any particular danger in the bend even though he

had travelled the road in the past (CA [120]); *(e)* no evidence that a reasonable person in the respondent's position would have required special precautions other than travelling well under the applicable speed limits (CA [120]); *(f)* the appellant had driven along the roadway 3 times in the previous 12 hours (CA [121]); and *(g)* the respondent's police statement said that he had observed the appellant's driving and formed the view that she '*knew what she was doing*' (CA [121]).

40. Those matters do not sustain the negative answer: *(a)* says nothing of the dangers presented by the speed driven. The evidence demonstrated that the speed driven was too great in the wet conditions because it created tyre slip from which the appellant was unable to regain control (see paragraphs 14 and 15 above) and that slip was not caused by the irregularity on the road; *(b)* is an incorrect application of cl 12(5)(b); *(c)* dealt with external warnings that were not present, but it was also evident that 100km/h was not a safe speed for the bend (in wet or dry conditions) and it says nothing of driving to the conditions; *(d)* is an incorrect subjective consideration and a consideration which the appellant says is not an available inference for the reasons set out in paragraph 36 above; and which danger did exist because the vehicle left the road without negligence on the part of the appellant and without any other proved causative mechanism other than speed on a wet road with an inexperienced driver; *(e)* again cannot stand against the matters referred to in paragraph 36 above; *(f)* speaks of the appellant's actual failure to appreciate the danger, and was not a reason identified by the respondent in evidence as being relevant to his decision to do nothing; and *(g)* again cannot stand against the matters referred to in paragraph 36 above and gives unwarranted effect to a self-serving and untested statement against contrary evidence to which the Court of Appeal did not refer (see paragraph 27 above).

41. The Court of Appeal made no reference to the appellant's limited competency as a learner driver (see paragraph 27 above) and that was relevant to the prospective inquiry as to what a reasonable person in the position of a supervisor would do by way of response to a foreseeable risk of harm. Skills at that limited level meant that the need for instruction, guidance and direction was clear. The Court of Appeal should have dealt with the appellant's competency at the time of the supervision by the respondent on the basis that, as a matter of probability, such a limited level of skill would have been apparent to a reasonable person in the position of a supervisor.

42. More fundamentally, however, when correct content is given to the duty of care as identified in paragraph 33 above, the prospective inquiry cannot justify a nil response. A reasonable person in the position of a supervising driver approaching a bend with no particular knowledge of the roadway and no particular knowledge of the learner driver's capacities on such a bend in wet conditions must have a duty to give proactive instruction, guidance and direction to reduce speed and to warn of danger. Where, as here, the respondent was familiar with the bend and the appellant's limited skills the duty must be much more strict. For the purposes of s.5B(2) of the *Civil Liability Act* 2002 (NSW) there was the required probability of harm occurring if care was not taken, the harm could be very serious, there was no burden in taking those precautions and there was no contrary social utility. Similarly, for the purposes of *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47-48, there was no identifiable expense, difficulty and inconvenience of taking alleviating action and no other conflicting responsibilities.

43. Causation: The respondent's failure to instruct, guide and direct the appellant to slow on approach to the bend was a necessary condition of the occurrence of the harm: s.5D(1) of the *Civil Liability Act* 2002 (NSW). The evidence referred to in paragraphs 14, 15, 19 and 20 above established that the speed of the vehicle into the bend resulted in, first, the initial slip, which then, second, led to a loss of control which could not be recovered by the appellant learner driver.

44. The speed of the vehicle at entry to the bend could not be calculated and the average speed through the yaw marks, 126m from entry, was calculated to be of the order of 70km/h. The only direct evidence as to the speed in the bend was the evidence of Ms Fancourt that it was *'roughly'* 80km/h halfway around the bend, which was materially unchallenged. She said that when she first saw the vehicle halfway around the bend *'it looked to be travelling too fast to take the bend'* (Exhibit F). The significance of her evidence was not the degree of precision of the measurement of speed (which she placed as roughly 80km/h) but that it was too fast to take the bend, a matter patently consistent with what occurred once the irregularity was excluded and a fact about which Ms Fancourt was not challenged and about which she had a proper basis for judgment.

45. The question of speed was affected by a primary error. The respondent's case was that acceleration after the slip meant that there was no relevant washing off of speed (by friction between the tyres and the road surface) in the *'fishtailing'* and yaw, and so, the speed through the yaw of 70km/h could be relied on as the speed through the bend prior to the loss of control. But that case had no proper evidential foundation.

46. The respondent's statement (paragraph 15 above) said that he saw the appellant accidentally press the accelerator on one occasion after the slip *'straight to the floor quite quickly'*, and after passing Ms Fancourt's oncoming vehicle, at the position that Mr Keramidas confirmed was virtually at the commencement of the yaw. This was at least 91m from where the slip had commenced *'halfway'* around the bend.

47. The factor which incorrectly led the Trial Judge and the Court of Appeal to find that there had been acceleration between the slip and the start of the yaw was that the *'fishtailing'* of the car increased in magnitude between those two points (TJ [76]-[77] and CA [142]-[153]). The oral evidence of Mr Keramidas, fundamental to the appeal finding, was to the effect that the *'exaggerated fishtailing was consistent with harsh acceleration being applied to the vehicle'* (CA [151]). But in the joint experts' report of Mr Keramidas and Mr Johnston (the appellant's forensic engineering witness) the following question and agreed answer appeared: *'Q16. Is Ms Fancourt's observation that the "fishtailing was getting more exaggerated" consistent with the defendant's observation that the plaintiff lifted her foot off the accelerator and then pressed the accelerator "straight to the floor quite quickly"? Response to Q16: As the experts indicated in answer to Question 14, the addition of acceleration in the area of the yaw would make little difference to the vehicle's speed at that point. If acceleration were applied earlier [prior to any side slip] then the vehicle's speed would increase. The observation of the "fishtailing was getting more exaggerated" more probably relates to the additional steering over corrections of the driver than of her having applied full throttle partway through the sequence of the vehicle's motion from the bend to the tyre marks.'* [It was uncontroversial that the tyre marks indicated the progress of the vehicle through the yaw].

48. The joint report was signed by both engineers, but had been prepared by Mr Keramidas. The Court of Appeal reproduced one sentence from the above passage at CA [150] and used it to find at CA [153] that the appellant '*applied sharp acceleration ... shortly after it began to slip*'. The Court of Appeal failed to give proper weight to the contradiction inherent in the joint report and the oral evidence and also failed to note that that Mr Keramidas had agreed (T398.46-47) that the respondent's description of events placed the acceleration '*virtually [at] the start of the yaw.*' That the Court of Appeal misunderstood the effect of that concession is apparent at CA [146] and [147]. The place of the acceleration would have been at least 91m from the initial slip which would negative the foundation of the findings that no speed was washed off between the slip and the yaw because of the counter effect of '*acceleration*'.

49. That misunderstanding was further used to base a finding that the speed at the slip and the start of the yaw was about the same (70 km/h), which the Court of Appeal found to be a safe speed. If the evidence had been properly understood and applied it is submitted the correct finding would have been that the vehicle was travelling through the bend before the slip at a speed of about 80 km/h – the speed which Ms Fancourt estimated, and had lost speed through the '*fishtailing*' manoeuvre.

50. The evidence of Ms Fancourt was not unreliable. The total cross-examination which founds the attack on her was: '*Q. You were asked about the speed and you said roughly 80 kilometres an hour, that was the word you used. I take it you used that word deliberately, because you were uncertain as to the precise speed? A. I don't think anyone could be certain. As a person just watching on, you couldn't be certain. Q. No, I understand that. When you said roughly 80, you weren't endeavouring to be precise? A. No*' (T114). In a statement to the police 11 days after the accident Ms Fancourt said: '*I can't accurately estimate the distance but I'd say I was around 30 metres from the bend when I first saw the car. To me it looked to be travelling too fast to that the bend. I couldn't estimate what speed it was doing other than to say it looked like around 80 kilometres an hour*' (Exhibit F).

51. The evidence that the car '*looked to be travelling to fast too take the bend*', important to the determination of the case in the appellant's submission, was barely given a passing glance by the Court of Appeal. This was the view of a witness who was not impugned in any way and who drove around the bend in each direction every day. She also gave evidence that she would not drive through the corner at 80 km/h because it '*is a very deceptive bend and I know that bend clearly, it might appear to be quite small a bend, but once you are in it you realise it is harder to get around than you thought*' (T111.27-31). Mr Keramidas conceded in cross-examination that Ms Fancourt's evidence in this regard was '*a fair description*' (T399.43-401.8) (also TJ [51]). The Trial Judge correctly identified that the evidence of Ms Fancourt was materially unchallenged (TJ [54]-[58]), but the Court of Appeal while noting this (CA [87]-[94]) treated it as if it had no impact (CA [133]) and the concession by Mr Keramidas and the evidence of Ms Fancourt properly permitted an inference that the respondent, by his travel of the road, knew, or should have known, of the deceptive nature of the bend.

52. The Court of Appeal effectively found that there was no cause of the accident. This demonstrated illogicality. It rejected the respondent's factual case that the appellant '*simply lost control of the vehicle, most likely as a result of her overreaction to irregularities in the road surface with the bend*' (CA [37], citing TJ [7]) (see also paragraph 15 above) – finding the Trial Judge's conclusion that the initial slip occurred '*some distance back*' from the irregularity was correct (CA [91]) – and incorrectly treated the question of speed as relating only to the question of whether the Trial Judge's finding of 70km/h (versus 80km/h) was incorrect (see CA [134]-[158], and the issue posed at CA [10]). As the initial slip was not caused by the irregularity, the only proper and available inference was that the speed of the vehicle on the wet road in the bend coupled with the inexperience of the appellant learner driver caused the accident. This was consistent with the evidence of Ms Fancourt and the respondent's description of the events. The Trial Judge was obviously aware of the difficulty this state of facts created for the respondent (T334.46-335.44) and, it is submitted, it was a material basis of her judgment (TJ [84]).

53. Speed was relevant to causation as it explained the cause of the accident (tyre slip on a wet road resulting in over correction and loss of control), particularly when the respondent's case that the irregularity was the cause was rejected. The dispute as to speed had forensic relevance to duty and breach because Mr Keramidas' evidence was to the effect that at 80km/h '*I would be expecting a supervising driver to be intervening*' and warn of speed (T321.41-321.1; T321.36-49; T321.10-25) (and this was a '*marginal*' requirement at 75 km/h: T321.44-49). The joint expert opinion was that at the start of the yaw the speed '*may have been a few km/h faster*' (Exhibit C, Blue 289.M) and that was consistent with Mr Johnston's calculation that the '*likely speed was probably around 75km/h at the commencement of the [yaw] mark*' (Exhibit M, Blue 76.D-E). As there was no reliable evidence of acceleration prior to the start of the yaw mark (see paragraphs 15 and 16 above) the speed at that point was, on the probabilities, less than the speed round the bend. Even without resort to the important evidence of Ms Fancourt, the evidence pointed to a conclusion that the speed of the vehicle round the bend was 80km/h or more.

54. The sequence, on the probabilities, of the loss of control was driving into the bend at speed, the initial slip at a position before the irregularities on the road surface, steering overcorrection causing fishtailing, more steering overcorrection causing increased fishtailing, passing Ms Fancourt's car and the accidental single episode of pressing of the accelerator virtually at the start of the yaw. Ms Fancourt's assessment that the car was travelling too fast to take the bend was correct: the sequence of events recorded in the respondent's statement confirms this. The experts could not calculate the speed at entry to the bend and calculated it at 70km/h through the course of the yaw but that said nothing of the speed at the apex of, and through the bend, or at the commencement of the yaw. The sequence of the loss of control shows that the accidental acceleration did not occur until well into the loss of control and at about the commencement of the yaw. There was nothing unreliable about Ms Fancourt's evidence that when she saw the car it was doing roughly 80km/h. The expert evidence established that it is difficult to accurately assess the speed of an oncoming car from a moving vehicle. However, Ms Fancourt's view of the vehicle when she saw it was not that of a straight oncoming view, but an angled view, and the respondent's expert (Mr Keramidas) acknowledged that that might reduce the difficulty in assessing the speed of the car (T392.O-393.N).

55. Respondent not called to give evidence: The respondent did not give evidence at the trial. This was evidentially significant. The respondent did not dispute the matters in the statement of Ms Taylor as to the competency of the appellant and he did not, in response to the burden of persuasion, present evidence that prevented a finding that, on the probabilities, the appellant's competency at the time of the accident was as described by her father and Ms Cassar. Further, he did not put evidence before the Court of other matters that would justify his actual supervision (nil) approaching and into the bend as being that which a reasonable person in his position would have done. This meant that the inferences to be drawn from the other evidence could be drawn more safely by the Court and it meant that ultimately the respondent's case suffered important evidential gaps that could only be filled by the respondent's evidence. The failure to call the respondent meant – as an application of *Jones v Dunkel* – that it did not assist the case the respondent was seeking to establish, but it also meant that the appellant's evidential case could be more confidently accepted.

Part VII: [applicable statutes]

56. Attached is a copy of clause 12(5) of the Road Transport (Driver Licensing) Regulation 1999 (NSW).

57. Attached is a copy of ss.5B and 5D of the *Civil Liability Act* 2002 (NSW) (Part 1A reproduced).

Part VIII: [orders]

58. The appellant seeks the following orders:

a. The appellant's appeal be allowed.

b. The Orders of the New South Wales Court of Appeal made on 23 August 2011 be set aside.

c. An order that the respondent's appeal to the New South Wales Court of Appeal be dismissed with costs.

d. The respondent pay the costs of the application for special leave to appeal and the appeal.

e. Such further or other Orders as this Honourable Court deems fit.

Dated: 5 April 2011

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Road Transport (Driver Licensing) Regulation 1999

Historical version for 1 July 2006 to 26 October 2006 (accessed 5 April 2012 at 15:11) **Repealed version**

12 Learner driver must be accompanied

(1) The holder of a learner licence must not drive a motor vehicle (other than a motor bike or motor trike) on a road or road related area unless:

(a) the seat next to the learner is occupied by a person who holds an Australian driver licence (not being an Australian learner licence or provisional licence) authorising the holder to drive such a vehicle, or by a police officer or a person authorised by the Authority to test drivers who is submitting the learner to a driving test for the purposes of this Regulation, and

(b) there is displayed conspicuously at the front and the rear or on the roof of the vehicle, so as to be clearly visible from ahead of and behind the vehicle, a sign, issued or authorised by the Authority, displaying the letter "L" in black on a yellow background.

(2) The holder of a learner licence must not ride a motor bike or motor trike on a road or road related area:

(a) if the motor bike or motor trike is being used for the carriage of any person except the learner, and

(b) unless there is displayed conspicuously at, and so as to be clearly visible from behind the motor bike or motor trike, a sign, issued or authorised by the Authority, displaying the letter "L" in black on a yellow background.

(2A) The Authority may exempt a person from a requirement in subclause (1) (b) or (2) (b) if the person, having held a licence other than a learner licence, currently holds a learner licence because of failing a test of driving or riding ability that the Authority required the person to take.

(3) The holder of a learner licence must not ride a motor bike or motor trike on a road or road related area unless, at the time it is ridden, the motor bike or motor trike:

(a) is of a kind included in the list *Approved Motorcycles for Novice Riders* published by the Authority from time to time on its Internet website and also available from motor registries, and

(b) has an engine capacity that is not greater than 660 ml and a power to weight ratio that is not greater than 150 kilowatts per tonne.

(4) Without limiting the liability of any other person, the owner or person in charge of a motor vehicle is guilty of an offence if he or she causes, permits or allows, or fails to take reasonable precautions to prevent, a contravention of this clause.

(5) A person accompanying a learner in a vehicle being driven by the learner on a road or road related area must:

(a) supervise the learner with respect to the driving of the vehicle, and

(b) take all reasonable precautions to prevent a contravention of the road transport legislation within the meaning of the *Road Transport (General) Act 2005*.

(6) Subclause (5) does not apply to a person submitting the learner to a driving test for any of the purposes of this Regulation.

Maximum penalty (subclauses (1)–(5)): 20 penalty units.

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New South Wales

Civil Liability Act 2002 No 22

An Act to make provision in relation to the recovery of damages for death or personal injury caused by the fault of a person; to amend the *Legal Profession Act 1987* in relation to costs in civil claims; and for other purposes.

Part 1 Preliminary

1 Name of Act

This Act is the *Civil Liability Act 2002*.

2 Commencement

This Act is taken to have commenced on 20 March 2002.

3 Definitions

In this Act:

court includes tribunal, and in relation to a claim for damages means any court or tribunal by or before which the claim falls to be determined.

damages includes any form of monetary compensation but does not include:

(a) any payment authorised or required to be made under a State industrial instrument, or

(b) any payment authorised or required to be made under a superannuation scheme, or

(c) any payment authorised or required to be made under an insurance policy in respect of the death of, injury to or damage suffered by the person insured under the policy.

non-economic loss means any one or more of the following:

(a) pain and suffering,

(b) loss of amenities of life,

(c) loss of expectation of life,

(d) disfigurement.

3A Provisions relating to operation of Act

(1) A provision of this Act that gives protection from civil liability does not limit the protection from liability given by another provision of this Act or by another Act or law.

(2) This Act (except Part 2) does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract with respect to any matter to which this Act applies and does not limit or otherwise affect the operation of any such express provision.

(3) Subsection (2) extends to any provision of this Act even if the provision applies to liability in contract.

3B Civil liability excluded from Act

(1) The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows:

(a) civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person—the whole Act except:

(i) section 15B and section 18 (1) (in its application to damages for any loss of the kind referred to in section 18 (1) (c)), and

(ii) Part 7 (Self-defence and recovery by criminals) in respect of civil liability in respect of an intentional act that is done with intent to cause injury or death, and

(iii) Part 2A (Special provisions for offenders in custody),

(b) civil liability in proceedings of the kind referred to in section 11 (Claims for damages for dust diseases etc to be brought under this Act) of the *Dust Diseases Tribunal Act 1989*—the whole Act except sections 15A and 15B and section 18 (1) (in its application to damages for any loss of the kind referred to in section 18 (1) (c)),

(c) civil liability relating to an award of personal injury damages (within the meaning of Part 2) where the injury or death concerned resulted from smoking or other use of tobacco products—the whole Act except section 15B and section 18 (1) (in its application to damages for any loss of the kind referred to in section 18 (1) (c)),

(d) civil liability relating to an award to which Part 6 of the *Motor Accidents Act 1988* applies—the whole Act except the provisions that subsection (2) provides apply to motor accidents,

(e) civil liability relating to an award to which Chapter 5 of the *Motor Accidents Compensation Act 1999* applies (including an award to and in respect of which that Chapter applies pursuant to section 121 (Application of common law damages for motor accidents to railway and other public transport accidents) of the *Transport Administration Act 1988*)—the whole Act except the provisions that subsection (2) provides apply to motor accidents,

(f) civil liability relating to an award to which Division 3 of Part 5 of the *Workers Compensation Act 1987* applies—the whole Act,

(g) civil liability for compensation under the *Workers Compensation Act 1987*, the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987*, the *Workers' Compensation (Dust Diseases) Act 1942*, the *Victims Support and Rehabilitation Act*

1996 or the *Anti-Discrimination Act 1977* or a benefit payable under the *Sporting Injuries Insurance Act 1978*—the whole Act.

(2) The following provisions apply to motor accidents:

(a) Divisions 1–4 and 8 of Part 1A (Negligence),

(a1) section 15B (Damages for loss of capacity to provide domestic services),

(b) section 15C (Damages for loss of superannuation entitlements),

(c) section 17A (Tariffs for damages for non-economic loss),

(c1) section 18 (1) (in its application to damages for any loss of the kind referred to in section 18 (1) (c)),

(d) Division 7 (Structured settlements) of Part 2,

(e) Part 3 (Mental harm),

(f) section 49 (Effect of intoxication on duty and standard of care),

(g) Part 7 (Self-defence and recovery by criminals),

(h) Part 8 (Good samaritans).

(3) The regulations may exclude a specified class or classes of civil liability (and awards of damages in those proceedings) from the operation of all or any specified provisions of this Act. Any such regulation may make transitional provision with respect to claims for acts or omissions before the commencement of the regulation.

3C Act operates to exclude or limit vicarious liability

Any provision of this Act that excludes or limits the civil liability of a person for a tort also operates to exclude or limit the vicarious liability of another person for that tort.

4 Miscellaneous provisions

(1) **Act to bind Crown**

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

(2) **Regulations**

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(3) **Notes**

Notes included in this Act do not form part of this Act.

(4) **Savings and transitional provisions**

Schedule 1 has effect.

Part 1A Negligence

Division 1 Preliminary

5 Definitions

In this Part:

harm means harm of any kind, including the following:

(a) personal injury or death,

(b) damage to property,

(c) economic loss.

negligence means failure to exercise reasonable care and skill.

personal injury includes:

(a) pre-natal injury, and

(b) impairment of a person's physical or mental condition, and

(c) disease.

5A Application of Part

(1) This Part applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

(2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

Division 2 Duty of care

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.

5C Other principles

In proceedings relating to liability for negligence:

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and

(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

Division 3 Causation

5D General principles

(1) A determination that negligence caused particular harm comprises the following elements:

(a) that the negligence was a necessary condition of the occurrence of the harm (***factual causation***), and

(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (***scope of liability***).

(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:

(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

5E Onus of proof

In determining liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

Division 4 Assumption of risk

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.

5G Injured persons presumed to be aware of obvious risks

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

(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.

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.

5I No liability for materialisation of inherent risk

(1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.

(2) An ***inherent risk*** is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.

(3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

Division 5 Recreational activities

5J Application of Division

(1) This Division applies only in respect of liability in negligence for harm to a person (***the plaintiff***) resulting from a recreational activity engaged in by the plaintiff.

(2) This Division does not limit the operation of Division 4 in respect of a recreational activity.

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.

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.

5M No duty of care for recreational activity where risk warning

(1) A person (***the defendant***) does not owe a duty of care to another person who engages in a recreational activity (***the plaintiff***) to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff.

(2) If the person who suffers harm is an incapable person, the defendant may rely on a risk warning only if:

(a) the incapable person was under the control of or accompanied by another person (who is not an incapable person and not the defendant) and the risk was the subject of a risk warning to that other person, or

(b) the risk was the subject of a risk warning to a parent of the incapable person (whether or not the incapable person was under the control of or accompanied by the parent).

(3) For the purposes of subsections (1) and (2), a risk warning to a person in relation to a recreational activity is a warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity. The defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.

(4) A risk warning can be given orally or in writing (including by means of a sign or otherwise).

(5) A risk warning need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk).

(6) A defendant is not entitled to rely on a risk warning unless it is given by or on behalf of the defendant or by or on behalf of the occupier of the place where the recreational activity is engaged in.

(7) A defendant is not entitled to rely on a risk warning if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a provision of a written law of the State or

Commonwealth that establishes specific practices or procedures for the protection of personal safety.

(8) A defendant is not entitled to rely on a risk warning to a person to the extent that the warning was contradicted by any representation as to risk made by or on behalf of the defendant to the person.

(9) A defendant is not entitled to rely on a risk warning if the plaintiff was required to engage in the recreational activity by the defendant.

(10) The fact that a risk is the subject of a risk warning does not of itself mean:

(a) that the risk is not an obvious or inherent risk of an activity, or

(b) that a person who gives the risk warning owes a duty of care to a person who engages in an activity to take precautions to avoid the risk of harm from the activity.

(11) This section does not limit or otherwise affect the effect of a risk warning in respect of a risk of an activity that is not a recreational activity.

(12) In this section:

incapable person means a person who, because of the person's young age or a physical or mental disability, lacks the capacity to understand the risk warning.

parent of an incapable person means any person (not being an incapable person) having parental responsibility for the incapable person.

5N Waiver of contractual duty of care for recreational activities

(1) Despite any other written or unwritten law, a term of a contract for the supply of recreation services may exclude, restrict or modify any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.

(2) Nothing in the written law of New South Wales renders such a term of a contract void or unenforceable or authorises any court to refuse to enforce the term, to declare the term void or to vary the term.

(3) A term of a contract for the supply of recreation services that is to the effect that a person to whom recreation services are supplied under the contract engages in any recreational activity concerned at his or her own risk operates to exclude any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.

(4) In this section, ***recreation services*** means services supplied to a person for the purposes of, in connection with or incidental to the pursuit by the person of any recreational activity.

(5) This section applies in respect of a contract for the supply of services entered into before or after the commencement of this section but does not apply in respect of a breach of warranty that occurred before that commencement.

(6) This section does not apply if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a provision of a written law of the State or Commonwealth that establishes specific practices or procedures for the protection of personal safety.

Division 6 Professional negligence

5O Standard of care for professionals

(1) A person practising a profession (***a professional***) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.

(2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.

(3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.

(4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

5P Division does not apply to duty to warn of risk

This Division does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in respect of the risk of death of or injury to a person associated with the provision by a professional of a professional service.

Division 7 Non-delegable duties and vicarious liability

5Q Liability based on non-delegable duty

(1) The extent of liability in tort of a person (***the defendant***) for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted

to the person by the defendant is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person in connection with the performance of the work or task.

(2) This section applies to an action in tort whether or not it is an action in negligence, despite anything to the contrary in section 5A.

Division 8 Contributory negligence

5R Standard of contributory negligence

(1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.

(2) For that purpose:

(a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and

(b) the matter is to be determined on the basis of what that person knew or ought to have known at the time.

5S Contributory negligence can defeat claim

In determining the extent of a reduction in damages by reason of contributory negligence, a court may determine a reduction of 100% if the court thinks it just and equitable to do so, with the result that the claim for damages is defeated.

5T Contributory negligence—claims under the Compensation to Relatives Act 1897

(1) In a claim for damages brought under the *Compensation to Relatives Act 1897*, the court is entitled to have regard to the contributory negligence of the deceased person.

(2) Section 13 of the *Law Reform (Miscellaneous Provisions) Act 1965* does not apply so as to prevent the reduction of damages by the contributory negligence of a deceased person in respect of a claim for damages brought under the *Compensation to Relatives Act 1897*.

6–8 (Repealed)