Carter Newell LAWYERS

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Two courts jump in to consider obvious risk

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The Queensland Court of Appeal handed down its decision in the matter of *State of Queensland v Kelly*[1] in late February 2014 in a very brief judgment, dismissing the government's appeal and upholding the trial court's verdict for the plaintiff.

On the same day, The Supreme Court of the ACT handed down judgment in the matter of *Ackland v Stewart, Vickery and Stewart*[2] in relation to a claim for personal injury arising from the plaintiff performing a backwards aerial somersault onto a jumping pillow in circumstances where the defendant argued it was a dangerous recreational activity.

The State of Qld v Kelly appeal

The claim involved an Irish tourist who had attended Lake Wabby on Fraser Island as part of a tour in September 2007. The plaintiff ran down a sand dune and fell into the lake. He suffered very serious spinal injuries (becoming a partial tetraplegic) in the fall and was awarded damages to be discounted by 15% for contributory negligence.

The State challenged the judgment at trial on the basis that the judge erred in finding that the risk of injury which materialised was not an '*obvious risk*' within the meaning of s 13 of the *Civil Liability Act 2003* (Qld) and, in the alternative, did not make a sufficient reduction of damages pursuant to the plaintiff's contributory negligence.

It was argued that a reasonable person would have heeded warning signs and not engaged in the activity of running down the sand dune, or would have proceeded with an awareness that it involved a risk of serious injury which the plaintiff

chose to take. It was further argued that the risk of injury from running down a sand dune was obvious and displayed on the signage.

Fraser JA distinguished this case from circumstances where a plaintiff engaged in a particular activity '*in the teeth of clear and unequivocal signage*'. Finding that it was appropriate for the trial judge to take the signs into account, the question on appeal was whether the signs '*effectively communicated the risk which materialised so as to make that risk obvious to a reasonable person in the respondent's position*'.

It was noted that the trial judge's conclusion that the risk was not obvious turned on the nature of the risk conveyed by the signs, suggesting that diving into shallow water was dangerous, as opposed to running down the sand dunes.

With numerous prior incidents of which the State was aware, in addition to the apparently very serious nature of the risk involved and signage was found to be insufficient to convey the risk of a serious head injury from running down the sand dunes into the lake.

Henry J noted that it was obvious that running down a sand dune into a lake involved some risk of injury. However, the question as to whether an activity involves an obvious risk of serious injury depends on the particular circumstances of the case to be determined as a matter of degree in consideration of the whole of the evidence, including evidence about warning signs.

The Court of Appeal found no error in the trial judge's conclusion that a discount should be applied as a result of the plaintiff's contributory negligence in circumstances where the risk which materialised was not an obvious risk. Although it was considered that the apportionment of 15% for contributory negligence could be thought to be '*generous*' to the plaintiff, the Court of Appeal did not consider the assessment was unjust or unreasonable so as to indicate an error which would justify a different result.

Ackland v Stewart

The Supreme Court of the ACT recently considered a defence of obvious risk in relation to a potentially dangerous recreational activity in the case of *Ackland v Stewart, Vickery and Stewart*,[3] handing down its judgment on 21 February 2014.

The claim

The claim related to an injury suffered by the plaintiff in October 2009 while he was a law student residing at a college in Armidale in NSW. As part of an organised group trip, the plaintiff attended an amusement park with a 'jumping pillow', similar to a trampoline. Along with others (from the group and other individual entrants), during the course of the day, the plaintiff performed manoeuvres on the jumping pillow including a back somersault. On one occasion, he landed heavily on his head and suffered serious neck injuries resulting in quadriplegia.

The claim was pursued on the basis that the defendants provided insufficient instruction, supervision and prohibition of particular manoeuvres on the jumping pillow. It was also alleged that the park failed to follow the manufacturer's instructions or display signage prohibiting such activities or warning of the risks involved in doing manoeuvres such as somersaults.

The defendant's position

The defendants denied the allegations. It led evidence that it had made an announcement over the loud speaker directing the group to cease using the equipment prior to this incident. In any event, the defendants argued that the plaintiff's injury arose solely as a result of his participation in a dangerous recreational activity. Alternatively, it was argued that the plaintiff's own negligence caused or materially contributed to his injury.

The law of New South Wales was referred to in determining the issues related to dangerous recreational activity and obvious risk as the incident occurred in that state. The provisions of the *Civil Liability Act 2002* (NSW) with respect to dangerous recreational activities and obvious risk were considered.

Witness evidence

During the trial, the plaintiff had acknowledged there was a risk he may fall awkwardly if he did not perform a manoeuvre properly, but said he was not aware that this may cause an injury, and certainly not a serious injury. The plaintiff drew reference from his childhood experience of attempting manoeuvres on a trampoline and not suffering pain or injury when landing incorrectly.

Various attendees of the park provided evidence about the use of the jumping pillow and instructions or directions provided during the day. Most witnesses recalled other attendees and members of their group doing back flips and other manoeuvres on the jumping pillow. They did not recall any announcements over a loud speaker being directed to their behaviour or directions regarding safety or appropriate behaviour in relation to the jumping pillow attraction.

The jumping pillow had been supplied with a manual and later, more comprehensive instructions with a focus on safety were provided to the defendant a few months prior to this incident. The additional safety material recommended that signage be displayed directing that '*no somersaults or inverted manoeuvres*' were to be performed.

One witness, called on behalf of the defence, gave evidence that no one else at the park was performing somersaults or other difficult manoeuvres on the jumping pillow on the date of the incident and strongly argued that a warning sign along the lines recommended by the supplier was displayed. Photographic evidence from the date in question demonstrated that no such signage was present, causing the trial judge to discount that witness's evidence as unreliable.

After hearing from multiple witnesses from the group attending with the plaintiff and others present at the park, the court concluded that no warning of the risk of injury from somersaults was provided to the group or that any instruction was given to cease using the equipment. Further, the court concluded that no steps were taken to prohibit dangerous manoeuvres on the jumping pillow.

Dangerous recreational activity?

The court considered a potential defence pursued by the defendants based on the plaintiff's participation in a dangerous recreational activity.

The activity of performing a back somersault on a jumping pillow was found to be a dangerous recreational activity, with the court having considered that question on an objective basis and disregarding the plaintiff's evidence that he was not aware of the risk of catastrophic injury in doing so.

Obvious risk?

In determining whether there was an obvious risk of injury when participating in that dangerous recreational activity, the risk was characterised on the basis that '*a person might suffer a serious neck injury if an inverted manoeuvre was not properly performed*'.

The defendants argued that a reasonable person in the position of the plaintiff ('*a 21 year old with sufficient intelligence to study law at university and was not intoxicated*') would have considered the risk to be obvious as a matter of observation and common knowledge. The court concluded it would not have been obvious that there was a risk of serious neck injury in attempting to perform a back somersault on the jumping pillow, as compared to a risk of some minor harm if the participant failed to perform the manoeuvre properly. The defence was therefore unsuccessful.

The court rejected the defence having found that the injury suffered by the plaintiff had not materialised from obviously risky behaviour. The risk was not considered to be obvious as it '*largely arose from the nature and performance of the surface of the jumping pillow, such that a reasonable user could infer that the danger of harm arising from the use of the pillow did not markedly differ from that of using a trampoline*'.

Breach of duty

The court determined that the defendants had breached their duty of care to the plaintiff, having failed to provide sufficient warning. In particular, the defendant failed to display the sign recommended by the manufacturer of the jumping pillow, or to paint the warning on the pillow itself with the assistance of the manufacturer for a very low cost, in comparison to the magnitude of the harm that may arise from performing the prohibited activity.

Ultimately, the plaintiff was successful in his claim, being awarded over $4.6 million in damages plus costs.

Conclusions

The magnitude of the benefit to a defendant who successfully argues that a risk was so obvious as to require no warning (being a full defence of a claim) justifiably results in a strict application of such a provision. It is clear from existing

precedent that the threshold to demonstrate that a risk is obvious and, as such, does not require a warning, is high.

The recent consideration of the question of what constitutes an obvious risk by the Queensland and ACT courts reinforces the difficulties of demonstrating that a particular risk from an activity conducted in a recreational setting is dangerous and that the risk which materialised was so readily apparent as to be obvious.

Each claim of this nature turns on its own facts but these recent decisions reinforce the court's traditional attitude that the defences available in relation to dangerous recreational activities and obvious risks will be reserved for only the most clear of cases.

[1] [2014] QCA 27.
[2] [2014] ACTSC 18.
[3] [2014] ACTSC 18.

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Australian Civil Liability Guide

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