DENNING

INSURANCE LAW

PUBLIC LIABILITY CASE REVIEW FY2016

Kate Denning, Denning Insurance Law

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1. ***Aldi Foods Pty Ltd v Young* [2016] NSWCA 109**

1.1 The Plaintiff was a customer in an Aldi (Defendant) store. A staffer was restocking display cases and the Plaintiff asked him where a product was. The Plaintiff moved behind the staffer who was unloading products from a D-Pallet on a pallet jack.

1.2 The store comprised two wide aisles running the length of the store, which in places, were separated by shorter, narrower, cross-aisles, at right angles to and connecting the lengthwise aisles. The pallet jack was in the right lengthwise aisle, blocking access to the cross-aisle.

1.3 As the Plaintiff moved behind the staffer, she stepped onto the prong nearest to her and lost balance. There was a factual dispute between the parties as to what was said by the staffer and the Plaintiff immediately prior to the incident. The CCTV footage did not support the evidence of either witness. Based upon the contents of an incident report and the Plaintiff's evidence, the trial judge was not prepared to accept evidence by the staffer that he told the Plaintiff she should avoid using the cross-aisle. The CCTV footage did not support the evidence by the staffer, that he had directed the Plaintiff to access the meat aisle by walking to the end of the fruit display.

1.4 The Plaintiff was successful at first instance. The Defendant appealed and the NSWCA was required to consider:

(a) whether the trial judge erred in rejecting the evidence of the staffer;

(b) whether *'viewed prospectively'* the Defendant breached any relevant duty of care it owed to the Plaintiff;

(c) causation;

(d) obvious risk; and

(e) contributory negligence.

1.5 The NSWCA found that while some criticism could be levelled at the trial judge for rejecting the staffer's evidence, what remained was the location of the pallet jack and the fact that the prongs were not readily observable.

1.6 Once the facts established the location of the pallet jack, its height and that the prongs were not plainly visible, the NSWCA was satisfied that the Defendant had breached its duty of care to the Plaintiff.

1.7 As to causation, the Court found that it was clear that a cause (if not the principal cause) of the Plaintiff's injuries was the manner in which the pallet jack had been left.

1.8 The primary judge's finding on contributory negligence of 10% was not disturbed. The NSWCA taking the view that the Plaintiff's contribution to her injury was minor and *'understandable omission to keep a look out for her own safety, but in circumstances in which she had no reason to anticipate danger.'*

2. ***Vincent v Woolworths Ltd* [2016] NSWSCA 40**

2.1 The Plaintiff was a store merchandiser employed by Counterpoint Marketing and Sales P/L. At the time of her injury she was working in a Woolworths's store arranging products according to a planogram. She stepped down off a safety step and collided with a customer pushing a trolley.

2.2 The Plaintiff looked in either direction before stepping down, however, she did not rotate her head all the way. The Plaintiff brought proceedings against her employer and Woolworths (Defendant).

2.3 The Defendant argued that the duty of care it owed to the Plaintiff was a *'bear'* duty as an occupier of premises. However, the Court found that the duty that Woolworths owed to the Plaintiff was a duty to take reasonable care to avoid foreseeable risks of injury

arising out of the activities requiring, in appropriate cases, the implementation of a safe system of work for visiting contractors and their employees.

2.4 The Plaintiff's claim failed at first instance because the Court decided that:

(a) if she had fully turned her head, the Plaintiff would not have stepped down and collided with the trolley;

(b) the safety step was adequate in the circumstances and allowed her to access lower shelves without restriction; and

(c) placing a barricade around the Plaintiff would have created difficulty and inconvenience to her work.

2.5 The Plaintiff appealed on negligence, causation and apportionment of responsibility between the Defendants. The Defendant appealed the question of the scope of the duty of care that the trial judge determined was owed.

2.6 The judgment on appeal concerning the claim against Woolworths concentrated on addressing submissions by the Plaintiff on section 5B of the *Civil Liability Act 2002* (NSW) (CLA NSW). Section 5B must be satisfied for a Plaintiff to establish a breach of duty of care. Section 5B says:

'(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.

2.7 The NSWCA was satisfied that the trial judge did not err in relation to the findings concerning section 5B because:

(a) the trial judge referred appropriately, to the principle that occupiers of property are, in general, entitled to expect that users of the property will exercise reasonable care for their own safety;

(b) it was unnecessary for the Defendant or her employer to give her a warning as the activity was one that would be likely to be encountered as much in ordinary domestic life as in the workplace; and

(c) bearing in mind the Defendant's reasonable expectation that ordinary care would be exercised by a person using a *'safety'* step and the absence of evidence of any previous supermarket accident in which a person had suffered appreciable injury as a result of collision with a trolley, the trial judge's rejection of the assertion that the risk was *'not insignificant'* within the meaning of section 5B(1)(b) was appropriate.

2.8 The NSWCA was also satisfied that the way that the Plaintiff was trained represented common practice throughout extensive supermarket operations of Counterpoint.

3. ***Hutchison Construction Services Pty Ltd v Fogg* [2016] NSWSCA 135**

3.1 The Plaintiff was employed by Plastamasta. Pursuant to an agreement between Plastamasta and Hutchison (Defendant), the Plaintiff delivered plasterboard to a construction site at which Kane Constructions P/L (Kane) was the head contractor. The Plaintiff fell over while delivering the sheets of plasterboard. The Plaintiff's fall was caused by stepping on an uneven surface in the location where he was directed by the Defendant to unload the plasterboard.

3.2 The Defendant was a sub-contractor to the head contractor, Kane.

3.3 When the Plaintiff arrived with the plasterboard, he was directed to unload them in an area by the foreman and said that it would have been better to unload them in another location because that other location was level. He suffered the injury after unloading 20 sheets. The location where the unloading occurred was uneven because of a drop of 60mm between the *'lip'* of an upper step and concrete, on which pavers would be laid in the future, and it was uneven because of the *'hob'* where the windows were to be installed. The Plaintiff reported the injury in writing 3-7 days later.

3.4 The Plaintiff sued the Defendant, Plastamasta and Kane. The trial judge dismissed the Plaintiff's claim against Plastamasta and Kane but found the Defendant liable.

3.5 The Defendant appealed: the findings of fact about how the incident happened; the findings on duty of care, breach and causation; and, the finding that Plastamasta had no responsibility.

3.6 The NSWCA dismissed the Defendant's appeal finding (relevant to duty of care, breach and causation) as follows:

(a) the Defendant failed to make any submissions in writing or orally against the formulation of a duty of care by the Defendant to the Plaintiff;

(b) the Defendant's insistence that it was *'just another contractor'* at trial, did not escape the fact that its employee directed the two men to unload their delivery in a place and at a time where they were exposed to the risk posed by the uneven surface;

(c) the activity was not an everyday experience in carrying bulky items – the risk was not obvious;

(d) this was a case where causation was obvious and intertwined with breach.

3.7 The Court did not interfere with the trial judge's findings on contributory negligence or apportionment.

4. *Hendrex v Keating* [2016] TASSC 20

4.1 Mr and Mrs Keating (Defendants) were homeowners. Mr Keating made arrangements for the Plaintiff to remove and replace the roof cladding at the front of their property. He enlisted the help of a group of friends to help him do the work. The Plaintiff was a roofing contractor. Mr Keating was masterminding the project and made available a ladder for the Plaintiff to use. Mr Keating remained present and was able to assess the adequacy or inadequacy of the ladder as a means of travelling to and from the carport roof.

4.2 The ladder could be used in its extended position or in an A-frame ladder position. It was placed in its A-frame position, 40 centimetres lower than the edge of the carport roof. The task of descending the ladder was somewhat awkward. If one descended reversing down (in the usual way) the top of the ladder was not visible.

4.3 The Plaintiff fell from the roof while descending the A-frame ladder front-forward.

4.4 The Plaintiff sued the Defendants on several bases:

(a) negligence;

(b) breach of contract;

(c) breach of statutory duties under WHS legislation.

4.5 The Court found that the Defendants were negligent noting:

(a) Mr Keating could have placed the ladder in an extended position and affixed it to the carport;

(b) the Defendants breached a duty of care to the Plaintiff – despite the fact that the Plaintiff, as a roofing contractor was in the same position to assess the risk;

(c) there was no implied term to take care for the Plaintiff's safety and the Plaintiff's statutory claim failed.

4.6 The Court found the Plaintiff contributorily negligent to the extent of 60%. The Court found that the Plaintiff increased the danger to him, by descending the ladder front-forward, relative to the risk which was posed by the Defendant. As such, the Court considered the Plaintiff should bear a greater responsibility for the incident.

5. ***Houghton v Rural Building Company* [2015] WADC 144**

5.1 The Plaintiff was employed as a professional cleaner by Tamari Professional Cleaning Services (Tamari). Pursuant to an agreement between Tamari and the Rural Building Company (Defendants), the Plaintiff was required to attend a property owned by the Defendants.

5.2 The Plaintiff suffered injuries as a result of a fall from an A-frame ladder whilst cleaning an external wall of the premises. To assist Tamari complete the task, the Defendants left an aluminium A-frame ladder at the property. The Defendants asked Tamari to clean the external wall. The Plaintiff was directed by her employer to clean the wall. In her evidence, the Plaintiff did not mention any knowledge of using *'three-point contact'*. The Defendant made no enquiries of Tamari as to the equipment they would require to complete the clean. The Defendants relied upon the professional services of Tamari to complete the task using its own employees, materials and equipment. The ladder was in no way defective. The ladder could have been properly used in its extended position for the task, had it been tied off correctly. Tamari had full and unfettered access to the site. The Defendants did not direct the manner in which the work was to be completed. The

Plaintiff gave evidence that she had not used an A-frame ladder previously but the Court did not accept that evidence.

5.3 The Court dismissed the Plaintiff's claim, principally because it was not satisfied that the Defendants owed the Plaintiff a duty of care. The Court rejected the submission by the Plaintiff that the Defendant maintained a supervisory role because it *'instructed or encouraged'* the use of the ladder. Otherwise the Court was not satisfied that the OHSA established that the Defendants owed a duty as occupiers, nor that the OHSA created a right of action against the Defendants.

6. ***Schuller v SJ Webb Nominees Pty Ltd* [2015] SASCRC 162**

6.1 The Plaintiff, while inebriated, fell from a chair on which she was dancing at the Port Broughton Sunnyside Hotel-Motel. The Plaintiff sued the Defendant, as proprietors of the hotel, in negligence and for breach of statutory duty.

6.2 The Plaintiff alleged that the Defendants sold her too much alcohol and failed to prevent her from dancing on the chair. The Plaintiff failed at first instance and appealed to the SCSA.

6.3 The issues on appeal were:

(a) whether the Defendants owed the Plaintiff a duty of care;

(b) whether the Plaintiff voluntarily assumed the risk; and

(c) contributory negligence.

6.4 The SCSA was satisfied that the trial judge correctly concluded that the Defendants did not owe the Plaintiff a duty of care to prevent her from falling from a chair while intoxicated. The reasoning followed the High Court decision of *CAL v Motor Accidents Insurance Board*. *CAL's case* is authority for the principle that the duty owed by

proprietors will not extend to inebriated persons beyond the static conditions of hotel premises unless it is established that there is an '*exceptional case*'. Underlying an exceptional case is the notion that a patron is so intoxicated by reason of alcohol supplied by the publican that the patron is completely incapable of any rational judgment or of looking after themselves.

6.5 As to voluntary assumption of risk, the SCSA was satisfied that it was open on the evidence to the trial judge to determine that the Plaintiff voluntarily assumed the risk and was not prepared to interfere with the finding of the trial judge.

6.6 However, the SCSA found that the trial judge erred in addressing contributory negligence. The trial judge was not required to consider contributory negligence having found against the Plaintiff on liability.

7. ***Stewart & Ors v Ackland*** **[2015] HCATrans 226**

7.1 The Plaintiff visited the Green Valley Farm NSW, which operated an amusement park. The park had a jumping pillow. The Plaintiff (aged 21) performed a backward somersault and came down on his neck, suffering tetraplegia.

7.2 The trial judge found that the Plaintiff had been engaged in a dangerous recreational activity for the purposes of the CLA NSW but was not satisfied that the risk was an obvious risk, under the CLA NSW. The trial judge awarded damages in favour of the Plaintiff in the sum of $4.6M.

7.3 The Defendants appealed the judgment to the ACTCA on liability only. The three main issues in the appeal to the ACTCA were:

(a) whether the risk was an obvious risk;

(b) whether the Defendants owed a duty of care to the Plaintiff to warn of the risk of injury of performing a backwards somersault; and

(c) whether the trial judge erred in finding the Defendant should have taken the precautions identified.

7.4 The Plaintiff was attending the park as part of a day's activities organised by the University of New England (UNE). He saw the jumping pillow and that children were using the pillow unsupervised. Six weeks before the Plaintiff's visit, the manufacturer of the jumping pillow sent a circular, enclosing a new owners' manual. The circular requested the recipient to:

(a) read the manual carefully; and

(b) attach additional signage to the pillow, including words to the effect, *'No somersaults or inverted manoevres'*.

7.5 Under the heading 'Supervision' it was noted that while Australian Safety Standards did not require jumping pillows to be supervised, the manufacturer strongly recommended that activities on the jumping pillow be supervised at all times by, *'(a) a site official, or (b) video camera with recording facility and regularly monitored'*.

7.6 The Defendants evidence was that a sign had been erected near the jumping pillow, warning users of the jumping pillow not to use it for backward somersaults. A WorkCover inspector noted the sign was present when he inspected the site 4 days after the incident but the trial judge found the sign had been erected between the time of the incident and the time of the inspection.

7.7 The Defendants only called one witness. The evidence of that witness was that there was an announcement on the speaker system that the UNE students were to keep off the park equipment. However, the trial judge found that the Plaintiff was not warned of any dangers of the jumping pillow.

7.8 On the question of obvious risk, one of the grounds of the appeal, the ACTCA agreed with the trial judge. The Court was satisfied that a reasonable person in the position of the Plaintiff would have:

(a) considered the surface of the jumping pillow similar to that of a trampoline;

(b) observed young children performing similar manoeuvres without any apparent attempt by staff at the park to stop them;

(c) reasoned that if there was a danger, a warning would have been given to young children and staff would take steps to stop them; and

(d) been entitled to reason that those who best knew the properties of the jumping pillow, namely its owners, apparently let young children perform somersaults on it.

7.9 The ACTCA was not satisfied that it should have been obvious to a reasonable person in the Plaintiff's position that they might suffer serious neck injuries from the manoeuvre. In arriving at its decision, the Court had regard to the decision of the *State of Queensland v Kelly*.

7.10 On the question of whether the Defendant was required to take precautions and whether the Defendants owed the Plaintiff a duty to warn of injury, the ACTCA was satisfied that the Defendants owed the Plaintiff, as an entrant, a duty to take reasonable care and they failed to do so.

7.11 At the very least, the communication from the manufacturer ought to have alerted them to the potential dangers of using the jumping pillow for back flips. The ACTCA considered that appropriate steps would have consisted of warning users not to do somersaults, and in prohibiting somersaults, using supervision as a backup. The Defendants took none of these steps. The appeal was dismissed with costs.

7.12 The Defendants then sought special leave to appeal to the HCA, identifying two issues which justified a grant of leave, namely:

(a) that the activity (being attempting to perform an inverted manoeuvre) was a dangerous recreational activity; and

(b) that the activity involved an obvious risk.

7.13 The HCA granted the Defendants leave. It is possible (though not a certainty) that the HCA was interested in clarifying whether the reference to an obvious risk under the CLA NSW was an obvious risk of a *minor* injury or *serious* injury.

7.14 The Plaintiff later made application for special leave to appeal the finding that the activity was a *'dangerous recreational activity'*. The application was granted. The parties filed orders to dispose of the matter that same day.

8. ***Alameddine v Glenworth Valley Horse Riding P/L* [2015] NSWCA 219**

8.1 The Plaintiff was injured when she fell from a quad bike at the Defendant's recreational facility at Glenworth Valley in NSW. The Plaintiff sued the Defendants in negligence and for non-compliance with guarantees relating to the supply of services regulated by sections 60 and 61 of the Australian Consumer Law.

8.2 The Plaintiff was riding a quad bike in a group. The group was led by an instructor employed by the Defendant. The recreational facility had a *'purpose built quad biking track'*. The Plaintiff's mother purchased the booking the day prior to the incident and on the day of the accident the Plaintiff signed a waiver.

8.3 The instructor set the speed for the group. The Court found that it was the excessive speed at which the group was set to travel which caused the Plaintiff's fall.

8.4 The Plaintiff was unsuccessful at first instance and appealed to the NSWCA. The appeal concerned:

(a) whether the Plaintiff was engaged in a dangerous recreational activity for the purposes of the CLA NSW;

(b) whether section 5N of the CLA NSW protected the efficacy of the waiver clause; and

(c) whether the Plaintiff was entitled to compensation under the Australian Consumer Law consumer guarantee provisions.

8.5 The NSWCA did not consider the activity of quad biking in this context was a *'dangerous recreational activity'*. The reasoning of the NSWCA relied heavily on the Defendant's website which (was the Plaintiff's mother's first point of contact with the Defendant and) said:

(a) quad biking was *'surprisingly easy'*;

(b) riders would be given a safety briefing; and

(c) *'individual instruction on how to control and manage [the] bike'* would be given.

8.6 There was evidence that participants were told to ride at a comfortable speed. But that did not negate evidence that the group was required to keep pace with the lead instructor.

8.7 As to the waiver, the Court took the view that the contract was formed between the Defendant and the Plaintiff's mother on the day prior to the incident. Accordingly, the Court reasoned that the waiver did not form part of, or vary, the contract.

8.8 The Court found that there were no contractual or statutory defences available to the Defendants to defeat the Plaintiff's claim under the ACL. The Plaintiff's appeal was successful.

9. *Fuller-Lyons v New South Wales* [2015] HCA 31

9.1 Master Corey Fuller-Lyons (Plaintiff) brought proceedings for damages in negligence, against the State of New South Wales (Defendant), as the legal entity responsible for the rail network.

9.2 The Plaintiff was eight (8) at the time of the incident. He was travelling with his brothers aged eleven (11) and fifteen (15). All three were in the lead car of an intercity electric V-set train (train) bound for Newcastle. About 15 minutes prior to the incident, the Plaintiff separated from his brothers.

9.3 A guard stationed in the rear car gave evidence that he walked along the train at Morisset Station prior to its departure and checked the doors before the train commenced its journey. The platform at Morisset Station is curved. A Customer Service Attendant (CSA) was also on the platform at the time. The guard relied upon the CSA to observe those cars that he could not see. It was the role of the CSA to signal to the guard when the train was ready to depart. The CSA on duty at the time of the incident was deceased at the time of trial.

9.4 The guard conceded it was not possible for someone standing at the rear of the train to observe all four (4) carriages. The guard said that because the doors were recessed, it was not possible to see if someone was holding something inside that recess. The trial judge concluded that it would not be possible for a guard at the rear car to see a small opening in the doors of the lead carriage.

9.5 The train left Morisset Station and two minutes later, the Plaintiff fell from the train. Following the incident, a rail officer inspected the doors and observed signs of disturbance with both sets of doors at the front of the lead car. On the eastern side, the doors stalled

momentarily when closing, creating a gap of about 350mm, and then continued to close and lock. On the western side, the doors closed with a gap of 100mm.

9.6 There was no direct evidence about the circumstances of the Plaintiff's fall. The parties lead expert evidence from engineers. The engineer called for the Plaintiff said that it was unlikely that the Plaintiff forced the doors against the pressure of the door motors. The State's engineer gave evidence that a 100m gap in the western side doors, suggested the doors had been held open at Morisset Station and later forced.

9.7 The trial judge found for the Plaintiff on the basis of inferential findings of fact. At first instance, it was accepted that the cause of the incident was the Plaintiff becoming trapped in the closing doors. The Court determined that the rail staff failed to observe the Plaintiff's body protruding from the train, before it had left the station.

9.8 However, in the NSWCA, the Court accepted an alternative hypothesis by the Defendant - that the doors were obstructed by the Plaintiff's shoulder, arm and leg, which would not have been visible. This hypothesis was to the effect that the Plaintiff had forced the doors open with the help of his brothers. The NSWCA allowed the Defendant's appeal.

9.9 The HCA concluded that a finding that the Plaintiff fell from the western side of the car was inevitable. Suggestions that the Plaintiff was up to mischief with his brothers were dismissed. It had not been put to the brothers that they had lied to the guard when questioned after the incident or that they were motivated to cover up any wrongdoing on their part.

9.10 In a judgment delivered on 2 September 2015 by French CJ, Bell, Gageler, Keane and Nettle JJ, the HCA determined the appeal was one for acceptance, finding as follows:

(a) expert evidence from an engineer supported a view that a large part of the Plaintiff's body became caught in the doors at Morisset Station;

(b) part of the Plaintiff's trunk and limbs would have been protruding from the train.

(c) it was accepted by the trial judge and the NSWCA that the child had his back to the doors prior to his fall; and

(d) the CSA failed to observe the Plaintiff protruding from the train, prior to it leaving Morisset Station.

9.11 Damages awarded to the Plaintiff were in excess of $1.5M.

10. *Sharp v Parramatta City Council* [2015] NSWCA 260

10.1 The Plaintiff suffered injuries when she landed awkwardly after jumping from the 10m diving platform at the Parramatta War Memorial Swimming Centre. She alleged that the Parramatta City Council (Defendant) was negligent in breaching its duty, as the occupier of the pool, to take reasonable care to avoid foreseeable risks of injury to those persons using the pool and diving tower.

10.2 The Plaintiff was unsuccessful at first instance and appealed to the NSWCA. The issues for the Court to determine were whether:

(a) the lifeguard instructed the Plaintiff to *'run and jump'*;

(b) the risk that manifested had been the subject of a risk warning within the terms of section 5M of the CLA NSW; and

(c) the injuries suffered by the Plaintiff amounted to harm suffered as a result of the materialisation of an obvious risk of a dangerous recreational activity under section 5L of the CLA NSW.

10.3 The Plaintiff's evidence was that the lifeguard said to her, *'well you can just take a run and jump'*. The lifeguard's evidence was that he gave the same instructions to everyone: jump *'like a pin, drop feet first'* or, *'so that you go vertically into the water'*. The NSWCA

was satisfied that the trial judge did not err in finding that the Defendant did not give a direction to the Plaintiff to *'run and jump'*.

10.4 The second issue was whether there was a risk warning provided to the Plaintiff for the purposes of section 5M of the CLA NSW. The trial judge found that section 5M was engaged. Section 5M states (in part):

'(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…'

10.5 A warning sign affixed to a pillar after the first flight of stairs in the dive tower read:

'PARRAMATTA CITY COUNCIL

PERSONS USING

THE PLATFORMS

AND

SPRINGBOARDS

DO SO AT THEIR OWN RISK'

10.6 The NSWCA found that the trial judge did not err in finding that section 5M was engaged by the warning sign because:

(a) the warning did to need to provide instructions to people as to *all* the steps necessary to avoid the risk;

(b) a warning addressing the general kind of risk involved without identifying each separate obstacle or hazard which may be encountered was sufficient: section 5M(5);

(c) the warning sign displayed was a satisfactory warning of the general risk of injury from diving or jumping involved in using the 10m platform;

(d) it was not necessary for the Defendant to warn the Plaintiff personally but rather, establish that a warning in the manner in which it was given would result in *'people'* being warned – i.e. people in the same position as the Plaintiff: section 5M(3); and

(e) the Plaintiff had to walk directly past the sign, which was at eye level and in large, clear letters.

10.7 The final issue for the NSWCA to address was whether the injuries suffered by the Plaintiff amounted to harm suffered as a result of the materialisation of an obvious risk of a dangerous recreational activity under section 5L of the CLA NSW. Section 5L states:

'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…'

10.8 The NSWCA determined this point in the affirmative noting:

(a) the risk which materialised was that of impact with the water surface from a height and in an uncontrolled or unintended way (citing *Dederer*);

(b) the risk would have been clearly apparent to and understood by a reasonable adult in the Plaintiff's position;

(c) the evidence from the Plaintiff and another witness was that jumping off the 10m platform was *'absolutely'* dangerous;

(d) the warning sign and presence of a lifeguard would have confirmed the existence of that risk in the mind of a reasonable person in the Plaintiff's circumstances;

(e) the activity of jumping into water from a height of 10m carried with it a probability of harm that was real and present; and

(f) the obvious risk which materialised was also, viewed prospectively, the significant risk of harm which made the activity of jumping from the platform *'dangerous'*.

10.9 Accordingly, the Plaintiff's appeal was dismissed with costs.

11. ***Kennedy v Shire of Campaspe* [2015] VSCA 215**

11.1 The Plaintiff was walking on a footpath in Echuca when she tripped over a lip created by uneven concrete paving sections. The Plaintiff sued the Shire of Campaspe (Defendant) in negligence and on the basis of a breach of statutory duty.

11.2 The lip on which the Plaintiff tripped, was between 10 and 12mm.

11.3 The Shire had a road management plan in place concerning the maintenance of footpaths. Under the plan, the Shire was required to intervene in relation to footpaths which had a difference in path surface levels of 30mm or more. The plan required that the Shire intervene within 30 days from the date a known defect on a footpath reaches the intervention level to effect repair or provide a warning.

11.4 Following an inspection 18 months and 2 days prior to the incident, the footpath had been placed on the Shire's *'proactive list'* for grinding. When resources allowed, the Shire would arrange for someone to grind the area requiring attention.

11.5 The Shire was required to undertake footpath inspections every 18 months. Accordingly, as the incident occurred 18 months and 2 days prior to the incident, the VSCA found that the Shire could not rely upon statutory defences. However, as the Shire was not positively required to *do* anything under its plan, the Court was not satisfied that the Plaintiff had established that the breach of statutory duty caused her injuries. That is, even if the incident had occurred within 18 months of the inspection, the Shire may not have repaired the footpath and its plan did not require it to.

11.6 Unusually, because the trial judge had not made any findings on the issues of negligence, breach of duty or contributory negligence at common law, the matter was remitted to the County Court for further hearing of the Plaintiff's claim in negligence.

12. ***Nightingale v Blacktown City Council* [2015] NSWCA 423**

12.1 The Plaintiff suffered injuries after falling into a sunken area of footpath. He alleged his injuries arose out of the negligence of the Blacktown City Council (Defendant) in failing to repair, adequately light, warn him or barricade the area, and by the Defendant's failure to have an adequate system of repair and maintenance.

12.2 The Plaintiff failed at first instance and appealed to the NSWCA.

12.3 The main issues on appeal were:

(a) the interpretation of *'actual knowledge'* in the context of the exception to the statutory defence available to the Defendant;

(b) whether the Defendant had actual knowledge; and

(c) whether the Defendant could be liable to the Plaintiff if it had conducted the inspections negligently.

12.4 The NSWCA refused the Plaintiff's appeal:

(a) with the majority adopting the decision of *North Sydney Council v Roman* on the interpretation of the term actual knowledge. To satisfy Roman's test the knowledge must exist at or above the level of the officer responsible for carrying out necessary repairs;

(b) finding that there was no basis upon which the Court could conclude that the officers of the Defendant whose knowledge was relevant for the Roman test, had *'actual knowledge'* of the relevant risk;

(c) holding that the immunity should apply to relieve the Defendant because the immediate cause of the Plaintiff's injury was the failure to repair the footpath (even though it may have also failed to inspect the area).

13. ***Collins v Clarence Valley Council* [2015] NSWCA 263**

13.1 The Plaintiff fell over the railing of a bridge, after the front wheel of her bike became stuck in a gap between the wooden planks of the bridge.

13.2 At the time, the Plaintiff was participating in the Sydney to Surfers Paradise Bicycle Ride.

13.3 The Plaintiff sued the Clarence Valley Council (Defendant) in negligence, claiming it had breached its duty of care to her by failing to eliminate or minimize the risks the bridge posed to cyclists by:

(a) repairing the bridge;

(b) erecting a sign warning cyclists of the dangers inherent in the state of the bridge;

(c) undertaking an adequate inspection; or

(d) installing higher guard rails.

13.4 The Plaintiff failed at first instance in the Supreme Court with Justice Beech-Jones finding that the risk of cyclists falling in between the planks was an obvious risk under the CLA NSW and that no duty of care was owed. The trial judge was also satisfied that immunity under the CLA NSW applied to any remedial work that the Plaintiff alleged should have been undertaken. The Court was satisfied that the Council officer with relevant authority to carry out the necessary roadwork did not have *'actual knowledge of the particular risk the materialization of which resulted in [her injuries]'*. This was despite the fact that the Defendant did not call the officer.

13.5 The Plaintiff appealed to the NSWCA and the Justices McColl, Macfarlan and Emmett agreed:

(a) the risk of harm was to be assessed prospectively, by reference to the defective conditions of the bridge, rather than by reference to the particular manner in which the appellant was injured by falling over the bridge. As such the trial judge did not err in identifying the risk of harm in question;

(b) the risk of harm was obvious within the meaning of section 5H of the CLA NSW because of the ubiquity of the gaps between the planks and the possibility of a wheel being jammed in between the planks. The Plaintiff was aware of the risk before she began to cross the bridge and she took the precaution of riding across at an angle to try and avoid that risk;

(c) a *Jones v Dunkel* inference could not be drawn because of the Defendant's failure to call Mr Madden. The inference could only be drawn if there was some basis for drawing an inference adverse to the Defendant, on a matter that Mr Madden could have spoken or given evidence to contradict.

13.6 Justices Emmett and McColl agreed that the evidence did not establish that any person within the Defendant had actual knowledge of the particular risk that materialised.

13.7 The Plaintiff's appeal was dismissed with costs.

14. ***Patrick Stevedores Ops P/L v Hennessy; FBIS International Protective Services (Aust) Pty Ltd v Hennessy* [2015] NSWCA 253**

14.1 The Plaintiff was employed by FBIS International Protective Security Services (Aust) Pty Ltd (FBIS). FBIS had a contract with Patrick Corporation to provide security services to Patrick Stevedores Operations (No 2) Pty Ltd (Patricks).

14.2 The Plaintiff fell while at work, stepping into a demountable hut. He alleged that the step from the ground into the hut was too high. He succeeded at first instance with apportionment being 60% against Patricks and 40% against FBIS.

14.3 The Defendants appealed. The issues on appeal were:

(a) breach;

(b) causation; and

(c) apportionment.

14.4 The appeal by Patricks was resolved by reference to the issue of breach only. The Defendants challenge to the trial judge's findings on breach were that the trial judge's finding that the step was too high, relied heavily upon the fact that an awning and another step were installed after the incident. The NSWCA found that inappropriate reliance was placed upon what Patricks did after the incident and that there was no basis for the trial judge to find that the step up from the pavers was *'higher than normal'* or *'awkward'*. The latter was contrary to the evidence of a witness that actually said that the addition of the intermediate step caused the ascent to be awkward.

14.5 The NSWCA determined that the evidence adduced at trial was inadequate to establish that a reasonable person in the position of Patricks would have taken the precautions (of adding the intermediate step and awning) to avoid the risk before the incident. This finding was sufficient to resolve the appeal by Patricks in its favour. However, the Court was not prepared to accept Patricks's submissions that it was not required to inspect the height of the hut because FBIS were responsible for coordinating and instructing its own personnel.

15. ***Sanchez-Sidiropoulos v Canavan* [2016] NSWSCA 221**

15.1 The Plaintiff hurt her hand while playing a game of tag known as *'table soccer'*, as a warm-up activity during PE class. She was injured when she collided with another child and fell on an asphalt surface. She claimed that her injury led her to develop Complex Regional Pain Syndrome.

15.2 The Plaintiff alleged that the school was negligent because:

(a) no formal or documented risk assessment was undertaken;

(b) inadequate instructions were given before the game began;

(c) the school failed to adequately supervise the students;

(d) the game should not have been played on an asphalt surface;

(e) table soccer was not an appropriate game for the students to play.

15.3 The Court found the Plaintiff to be an unreliable witness and the evidence of the teacher supervising the students was preferred. Expert evidence was called about the appropriateness of table soccer as a game for students and whether it was appropriate for it to be played on asphalt. The Court preferred the evidence of the Defendant's expert. Despite the fact that the teacher supervising the class did not see the collision and there was no risk assessment undertaken to consider the suitability of the game for the class, the Court rejected each of the grounds on which the Plaintiff alleged the Defendant was negligent. The teacher was supervising the group and the game had been played in schools across NSW. Most notable was this passage in the judgment by Justice Schmidt:

> *'Tag games, including table soccer, undoubtedly involve, as the experts agreed, foreseeable risks of collision, falls and injury. That is the result of their aim, namely, to teach students to think ahead and deal with unpredictable paths of running, as well as evasion tactics during team games.'*

15.4 Accordingly, the Plaintiff could not establish a breach of duty of care by the Defendant. The Plaintiff's case was impeded by a poor pleading and her lack of credibility as a witness, which was scrutinised in the findings on both liability and quantum.

16. ***Whittington v Smeaton* [2016] ACTSC 76**

16.1 The Plaintiff was the passenger on a jet-ski, riding as an observer. The operator of the jet-ski, Scott Smeaton (Operator) was unlicensed. The Operator was towing his brother, Todd Smeaton (Owner), who was barefoot skiing, while the Plaintiff was acting as spotter. The Owner fell off and the Operator turned the jet-ski to go back and collect him. As he did so, the jet-ski struck the wake of a passing vessel.

16.2 The Plaintiff's leg became entangled in the towrope and his foot was amputated. The Plaintiff brought a claim in negligence under the *Personal Injuries Proceedings Act 2002* (Qld) against the operator of the jet-ski, Scott Smeaton (Operator). The operator was the brother of the jet-ski owner, Todd Smeaton (Owner). The Plaintiff commenced proceedings against both the Operator and the Owner in the ACT.

16.3 The insurer of the vessel (Allianz) declined cover under its Club Marine Pleasurecraft Policy (Policy) because the Operator was not licensed to operate the vessel under Queensland law. The Owner and Operator joined Allianz to the litigation.

16.4 The success of the insurer's decision to decline cover depended on whether or not the Owner and Operator proved, for the purposes of s 54(3) *Insurance Contracts Act 1984* (Cth) (ICA) that no part of the loss that gave rise to the claim was caused by the act of the Operator in driving the jet ski while unlicensed, and hence that Allianz could not refuse to pay the claim by reason only of that act. Allianz submitted that some of the errors on the part of the Defendant were addressed in a course that was required to be completed

under Qld law and so the Defendants could not say that *'no part'* of the loss was caused by the act of the Operator being unlicensed.

16.5 The Court found the Operator negligent. The Court found that the Operator should have:

(a) ensured the Plaintiff was warned of approaching conditions, such as boat waked, which had the potential to unbalance him; and

(b) avoided sudden movements of the jet ski that might unbalance him.

16.6 Having regard to the Queensland course content for licensing of jet-ski operators and the circumstances of the incident, the Court found:

> *'although there is a chance that undertaking that course would have altered the manner in which Scott drove the jet ski on the day of the accident, when the matter is assessed on the balance of probabilities, it is clearly more likely than not that the obtaining of a Queensland licence would not have made any difference to the loss suffered by the plaintiff.'*

16.7 With this, the Court found the Operator negligent and Allianz liable to indemnify both Defendants for the claim. This decision clarifies that evidence of a *possibility* that an insured's act caused a loss will not allow an insurer to deny cover if the insured can prove on the balance of probabilities that other factors were a cause.

16.8 As to whether the activity was a dangerous recreational activity, the Court followed expert evidence that acting as an observer did not involve a significant risk of harm and neither of the experts were familiar with any other incidents in which an observer had sustained injury from falling off a jet-ski.

17. ***Allianz Insurance Ltd v Inglis* [2016] WASCA 25**

17.1 This was an appeal by Allianz Insurance Ltd (Allianz) to the WASCA. The case concerned a preliminary question about the application of section 54 of the ICA, based on an agreed set of facts.

17.2 The question to be decided was whether, on the proper construction of an Allianz Sure Cover Plus home insurance policy (Allianz Policy), Allianz was required to indemnify its Insureds for their liability to the Defendants.

17.3 The Insureds succeeded at District Court level. Allianz appealed that decision to WASCA.

17.4 Section 54 ICA states (in part):

> *'(1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.*
>
> *(2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim...'*

17.5 The Plaintiff, Ms Georgia Inglis (Georgia) (aged 10) alleges that she was run over by a ride-on lawnmower operated by the First Defendant, Mr Stephen Sweeney (Stephen) (aged 11).

17.6 Georgia is the daughter of Mr Stuart Inglis and Mrs Linda Inglis (Georgia's parents). Mr Stuart Inglis owned the ride-on lawnmower. Georgia lived with her parents. Georgia's parents were named insureds under the Allianz Policy.

17.7 It is alleged that on 17 October 2004, Mr James Inglis (James) (aged 12), Georgia's brother, rode the lawnmower from Georgia's parents' house, to the Second and Third Defendants' house. The Second and Third Defendants are the parents of Stephen.

17.8 Stephen ran over Georgia in a game that involved Georgia being towed behind Stephen on the ride-on lawnmower. Georgia brought claims against the Defendants. The Defendants brought claims against Mr Stuart Inglis and Georgia's brother, James (the Insureds). The Insureds brought claims against Allianz, for indemnity under the Allianz Policy.

17.9 The Allianz Policy contained the following relevant clauses:

Insuring clause

The Allianz Policy contained the following clause relating to cover for injury to other people:

'… We will cover your legal liability for payment of compensation in respect of:

death, bodily injury or illness…'

Exclusion clause

The Allianz Policy contained an exclusion clause which read:

'What you are not covered for:

We will not cover your legal liability for: …

injury to any person who normally lives with you, or damage to their property;'

17.10 Allianz denied indemnity under the Allianz Policy.

17.11 Allianz submitted that the expression *'a person who normally lives with you'* did not contain or constitute an *'act'* under section 54(1) but instead, was a state of affairs or, the status or description of a person.

17.12 It was the submission of the Insureds that the act must have occurred or (if continuous) be occurring at the time of the accident. The Insureds argued that this was mandated by the word *'lives'* in the expression, *'a person who normally lives with you'*. The Insureds did not suggest any other *'act'* engaged section 54(1).

17.13 In the judgment dated 3 February 2016, the Court allowed the appeal by Allianz, finding:

(a) *'act'* means something done or being done by a person. It is different from a state of affairs or the result of an act. Assistance in understanding the distinction between these things may be drawn from criminal law;

(b) the fact that a *'person normally lives with'* an insured does not constitute an *'act'* within the meaning of section 54(1).

17.14 The Court rejected the argument by Allianz that the Insureds' claims were in respect of liability of a kind not dealt with by the Allianz Policy.

18 ***Thomas v Trades & Labour Hire Pty Ltd & Anor* [2015] QSC 264**

18.1 Mr Grant Thomas (Plaintiff) was employed by Trades & Labour Hire Pty Ltd (Employer) to work at the Gold Coast City Council (Defendant) as a driver and operator of a tip truck (truck). The Plaintiff was an experienced driver and had worked around trucks for most of his working life.

18.2 The Plaintiff took a load of broken pieces of concrete curbing in the Defendant's truck to the Suntown Tip at Arundel. The truck was fitted with a tipper tray, which could be raised and lowered hydraulically. The Plaintiff decided to discharge the load under the tailgate, with it swinging on its horizontal axis. The Plaintiff chose this method, believing

that the pieces of concrete were small enough to go under the tailgate. A sample of concrete pieces taken from the load after the incident contained pieces around 600mm wide.

18.3 He released two clasps securing the bottom of the tailgate tray from inside the truck cabin. As he was discharging the load, the Plaintiff noticed something wrong with the tailgate. He said it looked as though one corner of the tailgate was hitting the ground. He went to inspect the issue.

18.4 The Plaintiff pushed on the tailgate and it fell to the ground, falling on him and causing serious injury to his left foot.

18.5 The matters in issue at trial were whether:

(a) the Plaintiff had pushed the tailgate immediately prior to it falling to the ground or whether it had 'popped off';

(b) the Defendant had an adequate system of maintenance in place for the truck; and

(c) the Defendant provided adequate training and instructions to the Plaintiff.

18.6 The Plaintiff had given prior inconsistent statements about the sequence of events leading up to the tailgate falling off. He told a co-worker after the event that he had pushed on the tailgate. He also said that he pushed on the tailgate in his Notices of Claim. However at trial, the Plaintiff said that he was just thinking about pushing on the tailgate and didn't actually push on it.

18.7 The Defendant had given a written instruction to workers to *'immediately report'* any problems with vehicles.

18.8 Expert evidence was led about whether the hinge pin, which was holding the tailgate on, was wearing prior to the incident and whether that wear should have been detected. The

Court found that the crack to the hinge pin was probably caused during manufacture and present for up to six (6) months prior to the incident.

18.9 Despite this, the Court did not consider that it was reasonable for inspection of the pin to form part of any inspection or maintenance process.

18.10 The Court found that the cause of the cause of the hinge pin breaking and the tailgate falling off, was the Plaintiff pushing on the tailgate. This was despite the evidence of the Defendants' and Plaintiff's engineers, that the tailgate could have fallen off without any interference by the Plaintiff.

18.11 The Court gave judgment for the Defendants.

19. ***Goodhue v VMR* [2015] QCA 234**

19.1 This case was a property damage matter but it is of interest because it is the first Queensland commentary on the sections of the *Civil Liability Act 2003* (Qld) (CLA QLD) dealing with the immunity of volunteers.

19.2 The Plaintiff anchored his vessel *'Warlock'* in Marine Stadium at the Spit at Southport on the Gold Coast. He left his vessel and travelled to New Zealand.

19.3 The Volunteer Marine Rescue Association (Defendant) is an incorporated association that was carrying on volunteer marine rescue services in the Southport area, by providing assistance to persons and vessels in the marine environment when requested.

19.4 The Defendant undertook approximately 900 jobs per year. The crews rostered on for those jobs comprised entirely of volunteers.

19.5 Three months after the Plaintiff had left to go to New Zealand a distress call was put into the VMR by a nearby vessel. The complaint was that the Warlock was dragging its own chain and was going to collide with that vessel.

19.6 The volunteer crew attended and obtained permission from local police, as that was their protocol, to board the vessel and re-anchor it. The vessel was re-anchored however, 10 days later it ran aground. The Plaintiff brought a claim for property damage against the Defendant.

19.7 One aspect to the Defence put forward by the defendant was that the Defendant was not liable for the acts of its volunteers by virtue of the exclusion in the CLA QLD for liability of volunteers. The argument put forward by the Defendant was that if an individual volunteer does not incur any civil liability – then the organisation for whom it does that community work, cannot incur civil liability.

19.8 The District Court found for the Defendant, making a number of findings of fact in favour of the Defendant.

19.9 However, in respect of the liability of volunteers the court expressed the view that where the law gives immunity to an individual volunteer from civil liability, that immunity should extend to the volunteer organisation for whom they do volunteer work. Because the plaintiff failed to prove that the actions of the volunteers actually caused the vessel to run aground, this finding did not determine the case.

19.10 The Plaintiff appealed the decision to the QCA. The appeal was dismissed and the QCA declined to address the question of immunity of volunteers under the CLA QLD noting that there were authorities in favour and against the argument at 19.7 above.

20. ***Marshall v GJ & KM Church and Jomik Investments* [2015] QDC 248**

20.1 The Plaintiff was employed by GJ & KM Church (trading as Panther Cleaning). The Plaintiff was required to perform cleaning services pursuant to a contract between Jomik Investments Pty Ltd (McDonald's) and Panther Cleaning.

20.2 The Defendant was the franchisee of a 24 hour McDonald's restaurant. The Plaintiff was assaulted at 2:00am in the carpark outside the McDonald's, part way through his regular night shift as a cleaner. Customers could dine in the restaurant until midnight and then they were served only through the drive-through facility until the restaurant re-opened at 5 or 6 am.

20.3 All of the Plaintiff's duties from midnight to 6:00am were to be performed inside. There was no reason for the Plaintiff to be outside - even rest breaks were to be taken within the restaurant area. While there was a general risk to all McDonald's stores like this of a hold-up, none of the staff that gave evidence at the trial expressed any particular concerns for their safety.

20.4 The Plaintiff was assaulted when he went outside the restaurant to see his girlfriend.

20.5 The Court was satisfied that both Defendants owed the Plaintiff a duty of care and that for McDonald's the Court found that duty extended to providing a safe system of work.

20.6 The Plaintiff alleged that McDonald's breached its duty of care to the Plaintiff by:

(a) failing to enforce the system of work, in particular, the cleaning schedule;

(b) failing to enforce the *'direction'* not to go outside at night; and

(c) failing to properly instruct, induct, monitor and supervise the Plaintiff.

20.7 The Court found that the Plaintiff failed to establish a want of care by the Defendants because:

(a) the Plaintiff knew about and performed his cleaning schedule;

(b) there were no prior instances of the Plaintiff going outside in the early hours;

(c) accordingly, there was no basis to find any failure to enforce the cleaning schedule;

(d) there was no basis for the Plaintiff to be outside the restaurant and he was not instructed to be;

(e) the Defendant had otherwise implemented appropriate security procedures.

20.8 The Court found further that the Plaintiff would have gone to see his friend regardless of any enforcement of the cleaning schedule and that the assault, while unfortunate, was not due to the negligence of the Defendants.