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THE CIVIL LIABILITY ACT … HAS IT SERVED ITS PURPOSE?

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Introduction

It has been 20 years since the introduction of the *Civil Liability Act 2002* (NSW) ('the Act') so it seems like an appropriate time to engage in a bit of reflection on its purposes and effects.

The *Civil Liability Act* commenced on 20 March 2002. The Act has been amended on a number of occasions, including by virtue of the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) and the *Civil Liability Amendment Act 2003* (NSW).

As set out in its Long Title, *the Civil Liability Act* is "*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 and civil claims; and for other purposes*".

In fact, it does much more than that. Specifically, its operation is not limited to personal injury claims. For example, Provisions such as in Part 1A ('Negligence') and Part 5 ('Liability of public and other authorities') are not limited to personal injury claims and the provisions in Part 4 in respect of proportionate liability apply only to non-personal injury claims.

In the Second Reading Speech in the Legislative Assembly,[1] reference is made to a so-called public liability crisis which affected sporting and cultural activities, small businesses, tourism, Councils and local communities. Reference was also made to the allegedly unsustainable approach of the courts which made it too easy for persons to receive compensation.

The introduction of the legislation followed the publication of the report known as the 'Ipp Review'.[2] That review was conducted by a Panel of Eminent Persons chaired by the Honourable David Ipp, a Judge of the New South Wales Court of Appeal. There may be somewhat differing perspectives on the need for the review and the context in which it took place. Media coverage at the time promoted the idea that New South Wales in particular was suffering from a tort law explosion, similar to that happening in the United

[1] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 May 2002 (John Della Bosca, Special Minister of State).
[2] Review of the Law of Negligence (Final Report, September 2002) ('*The Ipp Review'*).

States. In fact, that was not so. Perhaps the High Court had previously adopted a more expansive approach to tort law than earlier courts, but that was hardly promoting a tort law explosion. Indeed in cases such as *Agar v Hyde*[3] in 2000, the court emphasised the importance of personal responsibility when persons chose to engage in dangerous or risky activities.

In *Reynolds v Katoomba RSL All Services Club Limited*,[4] Spigelman CJ stated (at [26]):

> "*In many respects the tort of negligence is the last outpost of the welfare state. There have been changes over recent decades in the expectations within Australian society about persons accepting responsibility for their own actions*."

However, there was also said to have been an insurance crisis. The idea of the insurance crisis was of course promoted by the insurance industry and without necessarily delving into any statistical analysis, the so-called insurance crisis appears to have been created by a combination of factors. This included suggestions of a medical insurer being unwilling to offer insurance in Australia; the alleged difficulties of local Councils in obtaining liability insurance having regard to the volume of claims being pursued against organised entities such as Councils; the difficulties of sporting and recreational facilities obtaining insurance at an affordable rate; and of course the collapse of Australia's largest liability insurer, HIH Insurance Ltd ('HIH').

The Ipp Review also suggested that there was an opportunity to achieve national reform.[5]

The idea of tort law reform, of course, suggests that the new law will be better and improved for stakeholders. It was immediately apparent from the terms of the Ipp Review and the provisions of the new legislation that this statutory tort law reform would hardly be viewed as improved by injured persons.

It may be appropriate at this stage to reminisce. Some of you may not be aware of the history of tort law reform in New South Wales. Until such time as the introduction of Acts such as the *Workers Compensation Act 1987* (NSW), the *Motor Accidents Act 1988* (NSW) and related Acts in the late 1980s, assessment of damages was unrestrained by

[3] (2000) 201 CLR 552; [2000] HCA 41.
[4] (2001) 53 NSWLR 43; [2001] NSWCA 234.
[5] Ibid, 32 [1.36].

statute and the law of negligence was similarly developed through the common law. Until the introduction of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW), contributory negligence provided an absolute defence to any claim in negligence.

In the late mid to 1980s, the compulsory third party insurance scheme was bursting at the seams. There was only one insurer being the Government Insurance Office and there was no restriction on damages such that a person even with a very slight injury could claim damages. If a person had a sore neck for a month, they could claim damages for pain and suffering, and many did.

The first step in tort law reform was to open up the market to other insurers and impose statutory restrictions on damages through the *Motor Accidents Act 1988* (NSW). Similar legislation was enacted to curb the rights of employees to common law damages. As such, throughout the 1990s, the rights of persons who were injured in a motor accident or as an employee at work were restricted through statute, yet there were no restrictions on other tortious claims.

In the 1990s there was a significant backlog in the courts. In the District Court, a system of arbitration was put in place whereby almost all cases proceeded to arbitration conducted by an arbitrator before proceeding to a hearing before a Judge. These arbitrations were conducted in the District Court, primarily by persons who might be described as plaintiff's solicitors or counsel. Both parties had a right of re-hearing but there were significant costs penalties should the party not do better.

For a number of years, there were about 20 arbitrations listed each day in the District Court. The cases generally took an hour or two and there seemed to be little regard to the laws of evidence or, dare I say it, the laws of negligence, although perspectives might differ.

Meanwhile, in the Supreme Court, the delay also remained extensive. Mediations were rare.

In my experience, the arbitration system was effective in finalising cases but provided rather easy returns for those involved in the system. Cases against organisations such as Councils, statutory agencies, sporting associations, recreational facilities and indeed

occupiers of premises became more prevalent. The system was intended to provide for the cost effective disposal of actions but it also encouraged a proliferation of claims.

Experts willing to offer opinions on one side or the other flourished. At least at arbitrations and some lower courts, it seemed like the experts were being allowed to determine the facts, and even offer opinions on foreseeability and breach.

Meanwhile, HIH was on the march. In a little over 10 years, it went from being an underwriting agency to Australia's largest liability insurer, including professional indemnity insurer. It took over FAI, another large insurer, sight unseen, that is without doing due diligence. It all came crashing down on 15 March 2001 when HIH was placed into provisional liquidation. That left thousands of businesses without liability and professional indemnity insurance. March 2001 was not a happy time for claimants, insureds, other insurers and indeed even solicitors and barristers who lost substantial sums by way of outstanding fees (as HIH had not been paying for a while).

The Commonwealth Government established a scheme which, of itself, became subject to litigation in due course but ultimately proved successful, other than perhaps for those people who were creditors of HIH.

All of this led to the push for tort law reform and the introduction of the *Civil Liability Act*. Whilst it might be said that a purpose of the Act was to clarify and improve aspects of the law, it must also be said that its primary purpose was to reduce the quantity of claims, limit the types of claims and restrict the amounts that could be recovered by claimants, not just in personal injury but in claims for property damage and economic loss as well. Both anecdotally and statistically, it has achieved those aims.

The introduction of the *Civil Liability Act* in New South Wales and around Australia had an immediate effect. In a report commissioned by the Law Council of Australia in 2006 entitled "National Trends in Personal Injury Litigation: Before and After Ipp" and authored by Professor E W Wright, [6] the national total of personal injury claims per 10,000 dropped from 5.6 in 2001 to 1.8 in 2005 (see chart below). Similarly, the average annual injury claims for 10,000 population for each State reduced except in South Australia.[7] The

[6] Dean and Professor of Law, School of Law and Director, Justice Policy Research Centre, University of Newcastle.
[7] Ibid, 250.

number of personal injury claims commenced in the Supreme Court of New South Wales and the District Court of New South Wales went from 3,338 in 2002 to 1,184 in 2005.[8]

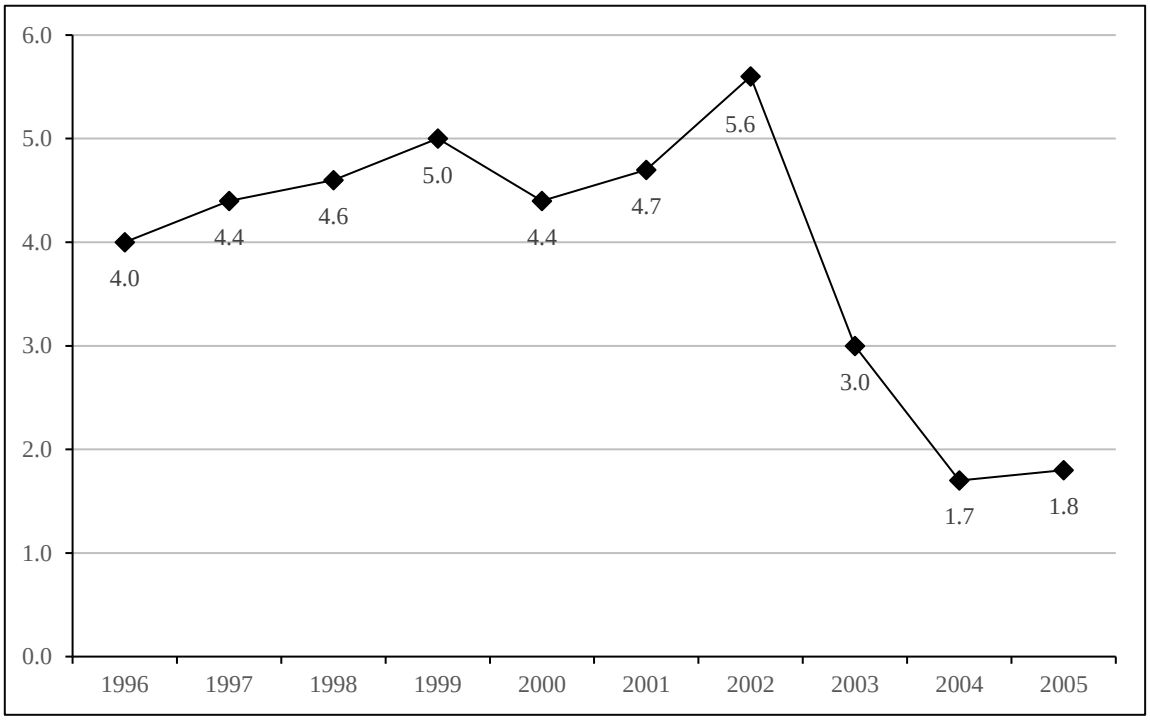

Figure 1: National total personal injury claims per 10,000 population, 1996-2005 (data incorporates estimates of NSW and Qld state totals). *Extracted from E W Wright, 'National Trends in Personal Injury Litigation: Before and After Ipp' (2006) 14 Torts Law Journal 233, 248.*

It is difficult to explain this significant drop on any basis, other than the impact of the *Civil Liability Act*, coupled with ongoing reforms in motor accident and workers' compensation areas. On these numbers, the so-called liability crisis ended quickly because the number of claims in 2005 was approximately only 60% of the volume ten years earlier. Whether there was a corresponding reduction in premiums, no doubt others are in a better placed to comment but perhaps not.

At least, anecdotally, the areas in which there has been the most significant reduction in the number of claims are those areas where protections were put in place by the introduction of the *Civil Liability Act*. Specifically, claims against Councils and persons involved in sporting and recreational facilities have plummeted.

[8] Ibid, 252.

Until the recent case of *Tapp v Australia Bushmen's Campdraft & Rodeo Association* ('*Tapp*'),[9] it had been a number of years since a plaintiff succeeded in circumventing the dangerous recreational provisions.

So why has the Act been so successful in reducing the volume of liability claims and by that, I mean, any claims arising out of a failure to take care?

I will deal firstly with some general reasons and comment on some specific provisions.

Firstly, subject to the exceptions set out in s 3B, Part 1A 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 (s 5A).

The operation of the Act cannot be defeated by pleading a case in contract or under statute and thus its operation is far-reaching. Of course there have been cases about the interrelationship between the *Civil Liability Act* and Commonwealth Legislation such as the Australian Consumer Law,[10] but that is a topic for another day

Secondly, the drafters of the legislation adopted the technique of starting with the statement that "a person is not liable unless …". That is as if to emphasise the Act was intended to limit claims , many sections start with the proposition to the effect the defendant should not be liable.

For example, as set out in s 5B(1), a person is not negligent in failing to take precautions against a risk of harm unless sub-paragraphs (a), (b) and (c) are satisfied. As is self-evident, the Court must start with the proposition that the defendant is not liable unless certain matters are established.

The onus is on the party seeking to establish negligence to satisfy each of the matters set out in s 5B(1)(a), (b) and (c). Perhaps this was in response to the so-called unsustainable approach of the courts but, in any event, the purpose of such a drafting style could only have been to ensure that the section operated almost as a limiting provision. Thus, there are three preconditions for any finding of breach of duty of care. A failure to satisfy even one will result in the defendant avoiding liability.

[9] (2022) 96 AJLR 337; [2022] HCA 11.
[10] *Competition and Consumer Act 2010* (Cth), Sch 2.

A similar approach was taken to other sections. For example, in s 5G, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk unless that person satisfies certain things. There is a rebuttable presumption that the person was aware of the risk.

In s 5H, a person does not owe a duty of care to another person to warn of an obvious risk, except one of the matters set out in s 5H(2) applies.

As set out in s 5M, a person does not owe a duty of care to another person who engages in recreational activity to take care if the risk was the subject of a risk warning to the plaintiff, subject of course to the matters set out in s 5M(2).

Similarly, in s 30 ('Limitation on recovery for pure mental harm arising from shock') the plaintiff is not entitled to recover damages for pure mental harm unless the plaintiff witnessed at the scene, the victim being killed, injured or put in peril, or is a close member of the victim's family.

Further, under s 45, a road authority is not liable for civil liability to which Part 5 applies unless at the time the authority had actual knowledge of the particular risk.

A similar approach was adopted to the sections dealing with damages, for example, the legislature sought to restrict the claims for gratuitous attendant care. Section 15(2) commences with "No damages may be awarded to a claimant for gratuitous attendant care services unless the court is satisfied that …".

I am not suggesting this is a novel drafting technique but just emphasising that one of the ways the legislature sought to bring clarity to the law of tort and perhaps protect those entities suffering as a result of the so-called insurance crisis, i.e. defendants, was to start with the proposition that there would be no liability, unless the person seeking damages satisfied certain things.

The next matter of significance is that the reference to risk and harm permeates the Act. There is an emphasis on personal responsibility, throughout the Act. The intoxication provisions offer a good example.[11]

[11] CLA, Part 6.

The key provision, s 5B, requires that a finding of negligence must be connected to the risk of harm. Only once the risk of harm has been identified can there be any assessment as to whether the risk was foreseeable and not insignificant and whether a reasonable person would have taken precautions.[12]

One question which has occupied the Court's time since the introduction of the *Civil Liability Act* has been the proper identification of the risk of harm. As was said in *Sibraa v Brown*,[13] s 5B "*requires risks to be assessed prospectively. As a matter of ordinary language a 'risk of harm' relates to harm that has not yet happened*."

Section 5B is concerned with breach and thus requires a forward-looking approach as opposed to causation which will generally require a backwards-looking approach having regard to what occurred.

As it is only against the identified risk of harm that the defendant is required to take precautions, then the proper identification of the risk of harm is important. As identified by Leeming JA in *Uniting Church in Australia Property Trust (NSW) v Miller; Miller v Lithgow City Council*,[14] there may be a range of risks and a range of harms. It was thought that for the purposes of some sections the risk might be identified narrowly, whereas for the purposes of other sections, the risk might be identified more generally. That may have changed having regard to the recent decision in *Tapp*, which I will come to later.

Further, the legislature placed emphasis on causation (s 5D) and ensured that the onus remained on the plaintiff to establish causation (s 5E).

As set out in s 5D(1), there are two elements to causation being:

(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).

Section 5D(1)(a) restored the "but for" test.

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[12] *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42 at [59] (Gummow J).
[13] [2012] NSWCA 328 at [41] (Campbell JA).
[14] [2015] NSWCA 320; (2015) LGERA 230 at [103]-[129].

Section 5D(2) introduced a normative criterion for the establishment of causation.[15]

In other words, satisfaction of the "but for" test is not sufficient. Whilst there may be a few cases in which the scope of liability provision has defeated a plaintiff's claim, it is a limiting provision which may be available in certain cases.

I now wish to deal with somewhat specific provisions. As I have already noted, three of the factors causing the so-called insurance crisis which led to the Ipp Review and the reforms introduced by the *Civil Liability Act* were the increasing liabilities of local Councils and alleged difficulties of Councils in obtaining insurance, the similar problem being experienced by sporting and recreational facilities and the so called problems emerging with medical indemnity insurance following the High Court's decision in *Rogers v Whittaker*.[16]

Liability of professionals

Dealing with that latter issue firstly, in *Rogers v Whittaker* the High Court held that a doctor was negligent in failing to warn a patient of a risk that consequent on an operation she might lose the sight in her eye (she was blind in the other eye) even though the chance was one in 14000 and there was evidence from peers that it was not the practice to warn of such a risk. The Court held that it was for it to determine the standard of care required rather than it being determined by peer professional practice.

As Gleeson CJ said in *Rosenberg v Percival*,[17] the "*responsibility for deciding the content of the doctor's duty of care rests with the Court, not with his or her professional colleagues*".

By approaching the matter in that way, a plaintiff's claim would not fail merely because the "defendant's conduct accorded with professional practice regarded as acceptable by some although not by others".[18]

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[15] *Wallace v Kam* (2013) 250 CLR 375; [2013] HCA 19 at [14] (French CJ, Crennan, Kiefel, Gageler and Keane JJ).
[16] (1992) 175 CLR 479; [1992] HCA 50.
[17] (2001) 205 CLR 434; [2001] HCA 18 at [7].
[18] *Dobler v Halverson* (2007) 70 NSWLR 151 at [59].

However s 5O changed the position. The standard of care imposed on a professional may be determined by evidence of peer professional opinion as to competent professional practice.

Section 5O thus governs the standard of care for professionals. Its effect was to restore a modified version of the *Bolam*[19] principle. Even though the Ipp Review only recommended that such statutory modification of the common law (that is, as set out in *Rogers v Whittaker*) be applied to medical professionals, the legislature determined that s 5O should apply to all persons engaged in professional practice.

When s 5O(1) is found to be satisfied by the Court, the established practice sets the standard of care, subject to rationality. If the defendant establishes that they acted in accordance with that practice, they will escape liability.

In the circumstances of any professional negligence case, a professional may escape liability by adducing evidence that he or she acted in a manner that was widely accepted by peers as competent professional practice.

Of course there has been much litigation about s 5O but the point remains its effect is to enable a defendant to avoid liability by adducing evidence that the conduct was consistent with peer professional practice regarded as competent.

Public Authorities

I am told by a very senior person working in claims management on behalf of Councils that the protections afforded by the *Civil liability Act* , specifically Part 5, have been spectacularly successful in reducing claims against Councils. I am told that the number of claims submitted would now be 10% of the pre-*Civil Liability Act* volume.

This is particularly so in respect of the Council as a road authority.

The background to the protections offered by the CLA is that, traditionally at common law, Councils had the protection of the non-feasance principle. In *Buckle v Bayswater Road Board,*[20] this was described as being the principle that there could be no civil

[19] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.
[20] (1936) 57 CLR 259; [1936] HCA 65 at 281.

liability incurred by a road authority by reason of any neglect on its part to construct, repair or maintain a road or other highway.

However, in *Brodie v Singleton Shire Council* ('*Brodie*'),[21] the High Court determined that the immunity in respect of non-feasance was no longer available, accepting that whether the Council was liable must depend on ordinary principles of negligence including the existence of a duty of care and whether the Council was in breach of the duty of care.

This meant that Councils could be liable for not only what they actually did but what they failed to do, such as failing to repair a road, a crack in a footpath or to erect a guardrail.

Plainly in an effort to solve the so-called Council liability crisis, the legislature introduced protections which are set out in ss 42, 43, 43A and 45. These protections apply to any claim arising out of a failure to take care and are not limited to personal injury claims.

Section 42 applies both in considering whether an authority has a duty of care and whether the authority has breached the duty of care. Both are limited by the financial and other resources reasonably available to the authority.

Sections 43 ('Proceedings based on breach of statutory duty') and 43A ('Proceedings based on the exercise of special statutory power') limit the potential liability of Councils having regard to the *Wednesbury*[22] unreasonableness. That is, the act or omission of the Council must have been so unreasonable that no authority having the power in question could properly consider the act or omission to be a reasonable exercise or failure to exercise its power.

Section 45 restores the special non-feasance protection for road authorities which was removed as a result of *Brodie*. As set out in s 45, a road authority is not liable for harm arising from a failure of the authority to carry out road work or consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.

[21] (2001) 206 CLR 512; [2001] HCA 29.
[22] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

Section 45 does not set out the circumstances in which a road authority will be liable or provide for some form of statutory cause of action. It is directed only at the issue of non-feasance and provides an absolute defence to a claim against a road authority unless the authority had actual knowledge of the particular risk.

This section was most recently considered by the New South Wales Court of Appeal in *Eddy v Goulburn Mulwaree Council* ('*Eddy*').[23] The phrase "*actual knowledge of the particular risk, the materialisation of which resulted in the harm*" was considered.

I recommend to you the judgment in that case for discussion on particular risks of harms and the proper approach to the identification of the risk.

As Kirk JA said at [85], the characterisation of the risk with respect to the road authority's actual knowledge will necessarily involve:

1. A higher degree of particularity than that required by s 5B analysis; and

2. It must meaningfully capture the risk that has come home so that it reasonably can be said that the roads authority did not know of particular issues causing the injury prior to the incident in question.

3. Does not require knowledge of every aspect of the precise causal pathway that led to the claim in suffering harm.

In the circumstances of *Eddy*, the Court accepted that the Council had actual knowledge of the particular risk the materialisation which resulted in the harm. The outcome of this case was perhaps dependant of the factual analysis, albeit it again provides some illumination on the categorisation of risk depending on which section of the *Civil Liability Act* is being considered.

[23] [2022] NSWCA 87.

Recreational Activities

Another area in which the *Civil Liability Act* has had success in reducing the number of claims through law reform is in the area of tortious responsibility for sporting and recreational activities.

The protection is broad. Firstly, recreational activity includes any sport, pursuit or activity engaged in for enjoyment, relaxation or leisure, any pursuit or activity engaged in a place such as a beach, park or public space. It includes professional sporting activities.[24] The description is apt to cover most things. For example, in *Coffs Harbour City Council v Polglase*,[25] walking along a jetty fell within the meaning of a recreational activity, albeit it was not suggested that it was a dangerous recreational activity. Unfortunately, it just turned out to be for the plaintiff.

Again, the legislature adopted the drafting technique of commencing with "*a person is not liable in negligence for harm suffered by another person* …" as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.[26]

Further, as set out in s 5M, a person does not owe a duty of care to another person who engages in a recreational activity in respect of a risk of the activity if the risk was subject of a risk warning to the plaintiff. Operators of sporting and recreational facilities can thus exclude any potential liability by means of an appropriate risk warning. Of course, what is an appropriate risk warning has been the subject of dispute.[27]

Sadly, many sporting injuries are catastrophic. Activities such as skiing, horse-riding, go-cart racing, contact sports, jumping into rivers, surfing can lead to significant injury or even death. Further, most sports involve some element of risk.

Dangerous recreational activity is defined to mean a recreational activity that involves a significant risk of physical harm.[28] In determining whether there was a significant risk of harm regard must be had both as to the nature and degree of harm that might be suffered,

[24] See *Goode v Angland* [2017] NSWCA 311; *Singh bhnf Ambu Kanwar v Lynch* [2020] NSWCA 152.
[25] [2020] NSWCA 265.
[26] *CLA*, s 5L(1).
[27] See *Coffs Harbour City Council v Polglase* [2020] NSWCA 265 at [111]-[120] (Leeming JA).
[28] *CLA*, s 5K.

on the one hand, and the likelihood of the risk of materialising on the other. The risk of physical harm may be significant when the risk of it happening is low but the potential harm is catastrophic.[29]

An example of the difficulties in refuting a contention that an activity is dangerous is *Castle v Perisher Blue Pty Ltd* ('*Castle*').[30] The plaintiff sought to establish that skiing was not a dangerous recreational activity by relying on statistics as to the number of persons skiing at Perisher and the number of accidents. The evidence tended to establish that:

1. There were approximately 600,000 visits to Perisher annually;

2. The ski lifts at Perisher have a collective capacity of 50,000 patrons per hour;

3. Even if the lifts were operating at 50 per cent capacity, the lifts could transport 25,000 patrons per hour or 900,000 per week, or 6 million per year; and

4. During the years 2017 to 2019, Perisher had a record of an average 64 collisions per annum, being an effective rate of person-to-person collisions of 1 in 200,000 lift rides.[31]

This was not many according to Perisher. The defendant thus submitted that the likelihood of collision was extremely low.

Leaving aside any question about the use of statistics to answer such a question, as was determined, even if the rate of collision per skier is low, the potential for harm was great.[32] Establishing that the incidence of injury in a particular activity is low will not necessarily overcome s 5L.

In any event, the point I am endeavouring to emphasise is that the dangerous recreational provisions of the *Civil Liability Act* have been remarkably effective in greatly reducing and almost eliminating cases in which persons injured in sporting accidents might succeed. Just in 2020, there were four cases determined in the New South Wales Court

[29] *Campbell v Hay* [2014] NSWCA 129 at [116] (Ward JA); *Falvo v Australian Oztag Sports Association* [2006] NSWCA 17 at [31] (Ipp JA).
[30] [2020] NSWSC 1652.
[31] Ibid at [141] (Cavanagh J).
[32] Ibid at [161] (Cavanagh J).

of Appeal, being *Menz v Wagga Wagga Show Society Inc* ('*Menz*')[33], *Singh bhnf Ambu Kanwar* ('*Singh*')[34], *Carter v Hastings River Greyhound Racing Club* ('*Carter*')[35] and *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* ('*Tapp*')[36] (as well as *Castle and Shaw v Oakdale Junior Motorcycle Club Inc*[37] at first instance).

In *Menz*, the plaintiff fell from a horse which was warming up before competing in equestrian events.

In *Singh*, the plaintiff fell during a horse race, albeit it was a professional horse race, the Court finding that the statutory definition of recreational activity cannot be read down by reliance on the ordinary meaning of recreational.

In *Carter*, the plaintiff suffered a serious injury to his left leg when he was voluntarily assisting the club by operating a catching pen gate.

In *Shore*, the plaintiff was engaged in go kart racing.

In all of those cases, the defendant succeeded. However, as we know that pattern has come to an abrupt holt in *Tapp*.

In *Tapp*, the plaintiff fell from her horse whilst competing in a campdraft event and suffered significant spinal injury.

Campdrafting is a sport involving a horse and rider working with cattle. Ms Tapp fell and suffered catastrophic injury (damages were agreed in the sum of $6,750,000) when her horse fell from under her, allegedly caused by the dangerous ground conditions. She alleged that the defendant was negligent in failing to stop the event proceeding due to the dangerous surface of the arena.

As we know, the determination of negligence requires an evaluative judgment. This case is a rather obvious example of how minds might differ.

[33] [2020] NSWCA 65.
[34] [2020] NSWCA 152.
[35] [2020] NSWCA 185.
[36] [2020] NSWCA 263.
[37] [2020] NSWSC 180.

In the Supreme Court, the primary judge found that the defendant was not negligent.[38] Two Judges of the Court of Appeal agreed, although one did not.[39] Two Judges of the High Court did not consider that the defendant was negligent, although three did.[40] There was a significant difference of opinion on all of the issues of breach, causation and the defence available under s 5L.

The appeal to the High Court raised two issues, being whether Ms Tapp had established that the defendant failed to take reasonable precautions against the risk of injury, that is, breach of duty, and secondly, whether s 5L applied to deny liability on the part of the defendant if liability was otherwise established. The majority dealt with the second question as the Chief Justice and Justice Keane did not consider that negligence had been established.

There was evidence of other falls on the day but the evidence did not establish that the falls were attributable to a problem with the surface of the arena. Two complaints had been made by another competitor about the surface of the arena on the day prior to the accident. Although the competitor urged that the course be closed because the ground was unsafe, other participants and Mr Shorten, who was the controlling mind of the organisation on the day, did not share that view. The prevailing view was that competitors should ride to the conditions. The defendant formed its own view as to the conditions and allowed the event to proceed. The primary judge did not accept that the exercise of reasonable care required the defendant to stop the event but rather that it was required to form its own view as to the conditions (which it did).

There was a significant factual issue as to whether the plaintiff had established that the horse fell because of any deterioration in the surface or for some other cause. The primary judge did not accept that the plaintiff had established that the horse fell because of any alleged deterioration in the surface.

There was a real difference of opinion in the High Court as to the approach which is to be taken to the proper identification of the risk of harm and the question of breach.

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[38] [2019] NSWSC 1506.
[39] [2020] NSWCA 263 (Basten JA and Payne JA, McCallum JA dissenting).
[40] (2022) 96 AJLR 337; [2022] HCA 11 (Gordon, Edelman and Gleeson JJ, Kiefel CJ and Keane J dissenting).

Kiefel CJ and Keane J observed at [62]:

> "*It could not be a correct approach as the case for Ms Tapp proceeded, to assume that what needed to be determined is a fact and then to proceed to determine whether a duty was owed with respect to it and what could have been done to avoid it*."

Leaving aside the issues of breach and causation which arose in *Tapp*, of more significance to the future determination of claims governed by the *Civil Liability Act* is the approach of the majority to the proper identification of the risk of harm.

It could not be in dispute that, as was held in *Roads and Traffic Authority v Dederer* and affirmed in *Tapp*, the proper assessment of the alleged breach of duty depends on the correct identification of the relevant risk of injury because it is only then that an assessment can take place of what a reasonable response to that risk would be.

Whilst recognising the identification of the risk of harm would not be straight-forward, a majority of the High Court (per Gordon, Edelman and Gleeson JJ) held that there are four significant matters that must guide the reasoning process concerning the selection of the correct level of generality being:[41]

1. The risk with which s 5L is concerned would usually need to be assessed after a determination that there is prima facie liability for negligence. This is directly contrary to the approach which has been consistently followed in the New South Wales Court of Appeal for some time.

2. The s 5L risk should be characterised at the same level of generality as the risk is characterised in the course of assessing whether the defendant has breached a duty of care. That means that in assessing and characterising the risk for the purposes of s 5L CLA, the Court must identify the risk in the same way as it did for the purposes of s 5B CLA. Again, that appears to be a new approach.

3. The generality of which the risk in s 5L is stated should include the same facts as established the risk for the purposes of breach of duty which caused harm to the plaintiff but no more.

[41] *Tapp* at [106]-[119].

4. The characterisation of the risk does not need to descend to the precise detail of the mechanism by which an injury has suffered if that detail is unnecessary to establish a breach of duty.

However, although the risk should be characterised in the same way for the purposes of s 5B and s 5L, the assessment of the obvious risk in s 5L proceeds from the perspective, not of a reasonable person in the defendant's position but, of a reasonable person in the position of the plaintiff.

As the High Court observed (at [116]) in *Tapp*, the focus should be on the same essential circumstances which established the necessity for a reasonable person in the position of the defendant to take reasonable precautions in performance of a duty of care. The risk with which s 5L is concerned is thus the same risk as that which s 5B is concerned.

The primary judge had identified the risk for the purposes of s 5L as being the risk that the horse would fall and the plaintiff would be injured. The High Court preferred the view taken by the dissenting judge in the Court of Appeal (McCallum JA, as her Honour then was) as the risk of injury as a result of falling from a horse that slipped by reason of the deterioration of the surface of the arena.

The identification of the risk in this way led to the findings that:

1. McCallum JA was correct to assess that Ms Tapp's case on breach of duty was strong. A reasonable person in the position of the Association would have taken the immediate precaution of stopping the event in response to the substantial evaluative risk of contestants being injured from falling from a horse that slipped on the deteriorated surface of the arena; and

2. Having identified and characterised the risk in that way, the High Court accepted that such a risk would not have been obvious to the plaintiff because she did not have the opportunity to examine the condition of the ground during the event and she would not have had any concerns about the condition of the ground having regard to the observations of other contestants and further, the decisions concerning the quality of the surface were made by the Committee. A reasonable person in her position was entitled to rely on the Committee such that the risk would not have been obvious to her.

Minds may differ as to the significance of this decision. Plainly, minds differed in the High Court having regard to the minority's comments on the use of hindsight and the extent to which the proper identification of the risk of harm requires the identification of the precise mechanism of injury. It seems to me that this decision has some significant consequences, being:

1. Unlike the approach that has been observed or should have been observed for a number of years, it is necessary to consider whether the defendant was in breach of a duty of care and for what reason prior to considering the application of s 5L CLA;

2. The characterisation of the risk of harm is the same for the purposes of the s 5B test as the s 5L test. That characterisation must be sufficiently precise to identify the true cause of the injury, albeit it must be expressed with the same level of generality as the risk is characterised for the purpose of s 5B. This applies to all claims, not just personal injury claims;

3. Once the description of the risk of harm for the purpose of s 5L is adopted consistently with the essential facts that establish the risk for the purposes of breach, then just like in *Tapp*, the prospects of establishing that the risk was obvious to an injured plaintiff must be significantly reduced; and

4. For example If the surface deteriorated prior to Ms Tapp participating in the event, then the risk was reasonably foreseeable and there were reasonable precautions which should have been taken. Further, as the deterioration was not obvious to Ms Tapp then the s 5L defence would not be available. It would not have been obvious to her as a competitor in a sporting evert that there was a problem with surface of the arena.

This approach must lessen the effectiveness of the s 5L defence. Of course it is not my role to comment on whether that is a good thing but it does seem to me that the approach in Tapp must lead to a reconsideration in the lower courts and by the parties as to how the risk of harm is formulated both for the purpose of s 5B and s 5L.

Conclusion

The theme of this presentation has been very much on the impact that the *Civil Liability Act* has had on preventing the so-called tort law explosion and reducing if not eliminating claims.

I can only say that on the 20th anniversary of the *Civil Liability Act*, the High Court has suggested that there is another way of looking at the issues of breach and risk of harm, as well as the dangerous recreational provisions of the Act which is less restrictive or prohibitive. Whilst minds may differ as to whether there is anything new in Tapp, in my view the Courts' approach to the vexed question of the proper identification of the risk of harm may enhance the prospects of persons seeking to establish negligence, no matter whether for personal injury or property damage.

Of course, each case must depend on its own facts and it will be interesting to see how the approach of the Court plays out in other cases, but I would anticipate considerable debate as to the proper identification of the risk of harm for the purpose of s 5B and reconsideration of what may be obvious in the context of sporting cases.

Of course, none of this means that there is suddenly going to be a flood of claims in the liability area.

Subject to what emerges as to the significance of *Tapp*, the *Civil Liability Act* has, in my view, well and truly achieved its purpose. It has provided greater certainty to the outcome of claims arising out of a failure to take care. It has resulted in a significant reduction in the number of claims and as well as significant reductions in the damages which would be payable at common law.

Further, at least in my view, there has been a degree of clarity in the approach which should be taken to cases governed by the CLA. Provisions such as the proportionate liability provisions and s 5O might be viewed as leading to a fairer system of compensation. It might also be said that those provisions which offered some sort of protection to Councils and those engaged in sporting and recreational activities was such that claims in those areas have not just been greatly reduced but nearly eliminated. On the other hand, after 20 years of the *Civil Liability Act*, perhaps cases such as *Tapp* and

Eddy might be viewed as offering some belated encouragement to those on the other side of the ledger.