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CIVIL LIABILITY ACT 2002 - BURDENS FOR A DEFENDANT

THE HON JUSTICE PETER GARLING RFD

INTRODUCTION

1 Now that nearly 12 years have passed since the *Civil Liability Act* 2002 was introduced, we have a substantial body of case law addressing the scope and operation of the Act. Many of the provisions of the *Civil Liability Act* have been discussed, scrutinised and ultimately, judicially determined.

2 So significant is the *Civil Liability Act*, that the Court of Appeal operates a website which provides annotations to specific sections of the Act and regularly updated references to decisions of courts dealing with those provisions.

3 Yet to my observation, speaking generally, many members of the legal profession have not entirely adjusted their outlook to fully embrace the Act. It continues to be quite common, in my experience reading pleadings in matters for which I have case management responsibilities and those which I hear, for personal injury practitioners to altogether ignore provisions of the *Civil Liability Act* in their pleadings, whether in Statements of Claim or in Defences. Even if the provisions are not entirely ignored, the pleadings often fail to adequately address the really significant provisions of the Act.

4 The purpose of this paper[1] is to identify and discuss the burdens which fall on to defendants if they wish to benefit from the provisions of the *Civil Liability Act.*

5 I will shortly come to some specific issues of pleading particular defences under the *Civil Liability Act*, but before I do it is necessary to commence with some general remarks about the obligations falling on to plaintiffs to plead causes of action to which the Act applies.

[1] I wish to acknowledge the significant assistance of my Tipstaff, Lucy Moclair-Adams in the preparation of this paper

RECAP OF PLAINTIFF'S OBLIGATIONS

6 In a previous paper to the Bar Association,[2] I addressed the impact of the *Civil Liability Act* on the law of torts, with particular reference to how it has affected the manner in which plaintiffs ought to appropriately plead causes of action to which the *Civil Liability Act* applies.

7 The existence of, and the nature and content of a duty of care is not directly addressed in the *Civil Liability Act*. The common law prevails. However, as the Act specifically addresses how a breach of duty is to occur, there is inevitably an influence upon the nature and content of the duty.

8 Although s 5B is found under the heading "Duty of Care", it clearly deals with breach of duty. It reads:

> **5B General principles**
>
> (1) A person is not negligent in failing to take precautions against a risk of harm unless:
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
> (b) the risk was not insignificant, and
> (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
>
> (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):
> (a) the probability that the harm would occur if care were not taken,
> (b) the likely seriousness of the harm,
> (c) the burden of taking precautions to avoid the risk of harm,
> (d) the social utility of the activity that creates the risk of harm.

[2] Address by The Honourable Justice P Garling RFD; 'A Judicial Perspective on the Civil Liability Act 2002 – Ten Years On', New South Wales Bar Association Personal Injury Conference: Sydney, 3 March 2012

9 As a starting point, to address the provisions of s 5B of the *Civil Liability Act,* a plaintiff must identify and clearly articulate the "risk of harm" against which it is alleged a defendant would be negligent for failing to take precautions. Section 5 of the *Civil Liability Act* defines "harm" as meaning "*harm of any kind, including … personal injury or death, damage to property and economic loss*".

10 It is essential to consider this phrase as the starting point of any pleading of a breach of duty, and to carefully identify the particular risk of harm to which all of the later steps contained in s 5B will apply. As the judgment of Gummow J in *Roads and Traffic Authority of NSW v Dederer*[3] clearly demonstrates, it is only through the correct identification of the risk that an assessment can be made of the defendant's knowledge of the specified risk of harm, of the probability of that risk occurring, and to evaluate the reasonableness of the defendant's response, or lack of response, to that risk. This avoids the type of error discussed by Gummow J in *Dederer.*[4]

11 The Court of Appeal touched upon this issue in *Garzo v Liverpool/Campbelltown Christian School*[5], where Basten JA held that regard ought be had to the mechanism of injury when considering what the risk of harm was for the purpose of s 5B of the *Civil Liability Act*. He said, at [7]:

> "7 Section 5B of the *Civil Liability Act 2002* (NSW) requires identification of a risk of harm, against which a person has failed to take precautions. **Given its context, the risk must be that which materialised in the case of the injured person seeking to claim in negligence.** That is because s 5B is dealing with a breach of a duty of care, being the duty of care owed by the defendant to the injured plaintiff. The relevant risk in the present case was the risk which materialised when the appellant slipped and fell. The harm suffered by the appellant, if it arose from the condition of the crossing at all, arose from the condition of the crossing as at the date of her fall. To establish a breach

[3] (2007) 234 CLR 330 at [59]-[61]
[4] ibid
[5] *Garzo v Liverpool/Campbelltown Christian School* [2012] NSWCA 151

of duty, she needed to establish that the crossing was unduly slippery on that date."[6] (Emphasis added)

12 Meagher JA, in *Garzo*, although fixing upon a risk of harm which was different from that described by Basten JA, said this at [22]:

> "22. To address the question and considerations in s 5B, it is necessary to formulate a plaintiff's claim in a way which takes account of the precautions which it is alleged should have been taken, and **identifies the risk or risks of harm which the plaintiff alleges eventuated and to which those precautions ought to have been directed**."[7] (Emphasis added)

13 May I also just remind you of the other central feature of the *Civil Liability Act*, namely the provisions with respect to causation. The terms of all of s 5D warrant attention:

> "**5D General principles**
>
> (1) A determination that negligence caused **particular harm** comprises the following elements:
> (a) that the negligence was a necessary condition of the **occurrence of the harm** (factual causation), and
> (b) that it is appropriate for the scope of the negligent person's liability to extend to the **harm so caused** (scope of liability).
>
> (2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why **responsibility for the harm** should be imposed on the negligent party.
>
> …
>
> (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why **responsibility for the harm** should be imposed on the negligent party." (emphasis added)

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[6] id at [7]
[7] id at [22]

14 But most importantly, for today's purposes, s 5D requires that attention first be given to the identification of the *"particular harm"* which it is said the plaintiff has suffered and to ask whether that particular harm was caused by the offending negligence which is the subject of the proceedings. The phrase "particular harm" is quite different from the phrase "risk of harm" used in s 5B of the Act about which I have spoken earlier because there is no reference to any concept of risk, and it refers to the actual harm which has in fact materialised.

15 Unless these matters are clearly and distinctly pleaded, as will shortly be seen, defences are apt to be overly general, and frankly, unhelpful in assisting in furthering the overriding purpose of the *Civil Procedure Act* 2005.

THE PRINCIPLES OF PLEADING

16 I will also take a short moment to remind you firstly, of the basic principles of pleading, and then share with you why it is an art.

17 I commence with the well-known passage from the High Court identifying the salient features of pleadings, whether a statement of a claim or a defence, as required by the common law. In *Dare v Pulham* [8], the High Court described the purpose of pleadings in this way:

> "Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it …, they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial …, and they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court.
> … The relief which may be granted to a party must be founded on the pleadings …"[9]

[8] *Dare v Pulham* [1982] HCA 70; (1982) 148 CLR 658
[9] id at 664

18 According to the provisions in the Uniform Civil Procedure Rules, pleadings:

- must contain only a summary of the material facts on which the party relies and not the evidence by which those facts are to be proved: UCPR 14.7;
- must plead specifically any matter that, if not pleaded specifically, may take [the other party] by surprise: UCPR r14.14(1) and (2);
- the defendant must plead specifically any matter that makes any claim or other case of the opposite party not maintainable or that raises matters of fact not arising out of the preceding pleading: UCPR r14.4(2);
- a pleading must give particulars of any claim, defence or other matter as are necessary to enable the opposite party to identify the case that the pleading requires him or her to meet: UCPR r15.1.

THE ART OF PLEADING

19 Now, with thanks to the now retired Justice Bryson, and with an acknowledgement to the author, William Faulkner, I can share with you the art of pleading, albeit expressed orally, and by an expert in the Court of Common Pleas in Yoknapatawpah County:

> “County Clerk: What is your claim?
>
> Plaintiff: This trailer trash ain’t giv’ me back that three hundred I loan’ him the borry of down in the saloon las’ Thanksgivin’.
>
> County Clerk: **Action for money lent**. What is your defense (sic)?
>
> Defendant: This varmint did’n’ tell ya how I hoed his fifty acre bottom lan’ all March and he done promise t’forget his goddam’ three hunderd.
>
> County Clerk: **Plea of accord and satisfaction**.
>
> Defendant: Anyways, he promise’ he’d pay me two hunderd over an’ above, and he ain’t done that no ways. He’s only here in court to shuffle out. Connivin’ rascal.

County Clerk: **Cross action for work and labour**.

Plaintiff: Surer'n' Hell I ain't goin' pay him nothin'.

County Clerk: **General Issue**. Pleadings close.

Plaintiff: Jes' confidential, is this Jedge on the level?

County Clerk: **Demand for Jury Trial**."

THE DEFENDANT'S BURDEN

20 If my earlier remarks on appropriate pleadings by plaintiffs have been heeded, the defendant in coming to plead a defence, should know from the Statement of Claim, first, what is the "risk of harm*"* against which it is claimed the defendant ought to have taken precautions and, secondly, the particular harm alleged to have been caused.

21 In my opinion, to appropriately plead any defence under the *Civil Liability Act*, the defendant must respond to the pleaded 'risk of harm', the particular harm alleged, and further, specifically plead the defence or defences they wish to rely upon under the Act, with careful attention to requisite elements of such defences as outlined in the provisions of the Act. Let me examine some of them.

CONTRIBUTORY NEGLIGENCE

22 Contributory negligence, in my experience, is the most commonly pleaded defence, but rarely is it pleaded in a manner which addresses the terms of, and the requirements of, the *Civil Liability Act.* The provisions of the *Civil Liability Act* dealing with contributory negligence also apply to motor accidents: s 3B(2)(a) *Civil Liability Act*.

23 According to the Ipp Report, contributory negligence is the legal manifestation of the "*fundamental idea that people should take responsibility for their own lives and safety*" and that "*in general, people*

[should] take as much care for themselves as they expect others to take for them."[10]

24 The Ipp Report recommended that legislation embrace the view that the standard of care applicable to both negligence and contributory negligence be the same, and that both be measured against an objective standard of reasonable conduct[11]. That aim seems to have been achieved: see *Consolidated Broken Hill Ltd v Edwards*[12] at [70].

25 By 2005, the common law was embracing a concept of contributory negligence which was similar to that recommended by the Ipp Report. In *Vairy v Wyong Shire Council*[13] at [220], Callinan and Heydon JJ said:

> "In a similar vein to what we have just said, and of relevance to any question of contributory negligence also, we would seek to make the point that it is not right to say, without qualification, that the difference between the duties of an injured plaintiff, and those of a tortfeasor, is that the former owes absolutely no duties to others including the defendant, while the latter owes duties to all of his "neighbours". The "duty" to take reasonable care for his own safety that a plaintiff has is not simply a nakedly self-interested one, but one of enlightened self-interest which should not disregard the burden, by way of social security and other obligations that a civilized and democratic society will assume towards him if he is injured. In short, the duty that he owes is not just to look out for himself, but not to act in a way which may put him at risk, in the knowledge that society may come under obligations of various kinds to him if the risk is realized." (footnotes omitted)[14]

26 Section 5R of the *Civil Liability Act* deals with the standard of contributory negligence, it is in these terms:

> "**5R Standard of contributory negligence**
>
> (1) The principles that are applicable in determining whether a person has been negligent also apply in determining

[10] The Hon David Ipp AO & ors, *Review of the Law of Negligence – Final Report* (September 2002) at para 8.10 (hereafter *Ipp Report*)
[11] *Ipp Report* at para 8.13
[12] *Consolidated Broken Hill Ltd v Edwards* [2005] NSWCA 380]
[13] *Vairy v Wyong Shire Council* [2005] HCA 62; (2005) 223 CLR 422
[14] id at [220]

whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.

(2) For that purpose:

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

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

27 In considering this section it is well to remember that s 5S permits a court to determine that a reduction could be as much as 100% if the court thinks that such a reduction is just and equitable.

28 There are undoubtedly difficulties with the legislated standard because it differs from the common law standard. Basten JA has identified some of these without entirely resolving the difficulties: see *Council of the City of Greater Taree v Wells*[15] at [105] – [113].

29 However, McColl JA (with whom Ipp and Basten JJA agreed) said in *Stojan (No 9) Pty Ltd v Kenway*[16] at [144]:

> "Pursuant to s 5R of the *Civil Liability Act,* the principles which are applicable in determining whether a person has been negligent also applied in determining whether the plaintiff was guilty of contributory negligence in failing to take precautions against the risk of harm which befell her. The standard of care required of the plaintiff was that of a reasonable person in her position, and the matter was to be determined on the basis of what she knew or ought to have known at the time": s 5R(2).[17]

30 Rule 14.16 of the UCPR provides:

> "**14.16 Defendant's pleading of contributory negligence**
>
> A defendant who relies on contributory negligence must plead **specifically** the contributory negligence." (emphasis added)

[15] *Council of the City of Greater Taree v Wells* [2010] NSWCA 147
[16] *Stojan (No 9) Pty Ltd v Kenway* [2009] NSWCA 364
[17] id at [144]

31 I suggest that a consideration of the principles which I have discussed, together with paying attention to the word *"specifically"* which I have emphasised, leads to the conclusion that a pleading of contributory negligence requires a real degree of precision. Particulars of the following kind, recently referred to in a judgment of the Court[18] do not address what is required:

> "The plaintiff:
>
> a) Failed to take any proper care in and about the performance of his work;
>
> b) Failed to take any steps to avoid the consequence of any act or omission of the defendant relied upon by him;
>
> c) Failed to take proper precautions for his own safety in the performance of his work."

32 As can be seen these are generic, make no reference to any specific act or omission, and do not address the notion of the "risk of harm" called up by s5B, or the "particular harm" referred to in s 5D.

33 In my view, such a pleading is at real risk of being struck out, if application is made. After all, there is no identification of any real issue, and such inadequate particularisation does not provide the plaintiff with any idea as to what is alleged.

34 The standard to be applied is an objective one, ie a reasonable person in the plaintiff's position. Careful pleading by reference to such an objective standard is required. Such a pleading may avoid exchanges of the following kind, as judges struggle to identify the relevant objective standard:

> "**CALLINAN J:** Mr Jackson, it seems to me that clearly the people at the party, including Ms Joslyn and Mr Berryman, went out with the intention of getting drunk.
> **MR JACKSON:** It would be a big night, your Honour, big night.

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[18] *Campton v Centennial Newstan Pty Ltd [No.2]* [2014] NSWSC 177 at [35]

> **CALLINAN J:** With the intention of getting drunk and they fulfilled that intention.
> **MR JACKSON:** Well, your Honour, young people sometimes - - -
> **KIRBY J:** I just think "drunk" is a label and I am a little worried about - it is not necessary to put that label. It is just that they were sufficiently affected by alcohol to affect their capacity to drive.
> **MR JACKSON:** Yes.
> **KIRBY J:** "A drunk" has all sorts of baggage with it.
> **HAYNE J:** Perhaps "hammered" is the more modern expression, Mr Jackson, or "well and truly hammered".
> **MR JACKSON:** I am indebted to your Honour.
> **KIRBY J:** I do not know any of these expressions.
> **McHUGH J:** No, no. Justice Hayne must live a very different life to the sort of life we lead.
> **KIRBY J:** I have never heard that word "hammered" before, never. Not before this very minute."[19]

PROFESSIONAL NEGLIGENCE

35 Another significant burden for defendants is how they deal with the availability of the statutory from of the *Bolam* defence, in cases involving professional negligence.

36 Under the Australian common law, it was a matter for a court to determine whether a defendant sued in his or her capacity as a professional person was in breach of the requisite standard of care, namely *" … that of the ordinary skilled person exercising and professing to have that special skill."*: see *Rogers v Whitaker*[20] .

37 In contrast, the English common law position was that a professional was not negligent if he or she had *"… acted in accordance with a practice accepted as proper by a responsible body of [professionals] skilled in that particular art"*[21].

38 Following a specific recommendation in the Ipp Report[22], the *Civil Liability Act* introduced what was been described as a " *… modified version*" of the *Bolam* principle[23].

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[19] *Joslyn v Berryman* S122/2002 [2002] HCATrans 573 (8 November 2002)
[20] *Rogers v Whitaker* [1992] HCA 58; (1992) 175 CLR 479 at 473.
[21] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 per McNair J at 587
[22] *Ipp Report*, Recommendation 3, pp 41-42

39 Section 5O of the *Civil Liability Act* is in the following terms:

> "**5O Standard of care for professionals**
>
> (1) A person practising a profession ("a professional") does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.
>
> (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.
>
> (3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
>
> (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted."

40 In passing, I should note that s 5P of the *Civil Liability Act* provides that section 5O does not apply to any duty of care to warn of the risk of injury or death.

41 The operative words of the section are *" … does not incur a liability if …".* Those words suggest that the provision operates as a defence, negating liability. The Court of Appeal has held that a defendant wishing to rely on the defence contained in section 5O must plead the material facts which, if established, engage section 5O and therefore negative a finding of liability in negligence.[24]

42 In *Sydney South West Area Health Service v MD*,[25] Hodgson JA (Allsop P & Sackville AJA agreeing) said at [23]:

> "In my opinion, s 5O does contemplate proof of material facts which, if established, would negative a finding of negligence which otherwise might be available; so in my opinion the material facts contemplated by s 5O should be pleaded in a defence, even if

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[23] *Ipp Report* at para 3.5

[24] *Sydney South West Area Health Services v MD* [2009] NSWCA 343

[25] [2009] NSWCA 343

specific reference to s 5O is not mandatory. However I would say that specific reference to s 5O would be desirable."[26]

43 In the same case Allsop P (Sackville AJA agreeing), with his customary precision, said;

> "First, the *Civil Liability Act 2002* (NSW), s 5O does need to be pleaded. It is not just a matter of evidence. It transfers, to a degree, the onus of proof. It transforms what would otherwise be relevant evidence as to negligence to be weighed by a judge in the familiar calculus into evidence that may be determinative of the appeal. …it is a matter that needs to be pleaded. There is also the question of the surprise rule and precise terms of the relevant rule, *Uniform Civil Procedure Rules* 2005 (NSW) r 14.14."[27]

44 These remarks reflected the approach which the Court of Appeal had taken in *Dobler v Halverson*[28] at [61], where it concluded that there is no doubt that the onus is on the defendant to prove that he or she acted in a manner which accorded with what was, at the time, widely accepted by peer professional opinion as competent professional practice:

45 In my opinion, it is insufficient to plead, without more, that the defendant acted in a way, which complied with widely accepted professional practice. In other words, merely restating the words of the section is inadequate. What is required, when pleading a s 5O defence, is a sufficient articulation of the defendant's manner of practice in the particular case, and an articulation of the competent professional practice being relied upon.

46 If the negligent conduct is said to have been constituted by an omission, commonly in the medical sphere, an omission to undertake an identified test, eg a biopsy, or a colonoscopy, then the defendant, in such a case, if seeking to rely on s 5O, may need to plead, albeit concisely, and prove, what the context for the consultation was, what opinion the defendant formed, perhaps the differential diagnosis which was reached, and that the test which is alleged ought to have been carried out, was unnecessary, or

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[26] *Sydney South West Area Health Services v MD* [2009] NSWCA 343 at [23]
[27] id at [51]
[28] *Dobler v Halverson* (2007) 70 NSWLR 151

inappropriate, or too risky as the case may be. Only then will the defence have been engaged in a way which enables the necessary evidence to be obtained and led at the trial, rulings as to admissibility to be made, and the matters in issue identified for any joint conclave of experts.

47 One reason why such a pleading is necessary is because, if s 5O is relied upon, it becomes a matter for the plaintiff to consider whether he or she wishes to argue that the provisions of s 5O(2) are applicable. You will recall that this sub-section raises the question of the rationality of the professional practice. So, the appropriate course will be for the plaintiff to file a Reply which contains the assertion that the professional practice relied upon by the defendant in the defence is irrational, and that s 5O does not have any application in the circumstances.

48 Such a course of pleading ensures that there can be no surprises, and any risk of ambush in the conduct of the litigation is avoided.

RISK

49 A significant area of reform introduced by the *Civil Liability Act* is that dealing with risk and liability which attaches to the occurrence of inherent and obvious risks. One of the reasons for the review which resulted in the Ipp Report was the perception that an individual's personal responsibility whilst engaged in a range of activities had been left out of consideration by courts.

50 The Premier, the Hon R J Carr MP said on 24 October 2002, when introducing the Bill which became the Civil Liability Act, this:

> "The bill will limit claims that arise from an inherent or obvious risk, or from the plaintiff's own contributory negligence. There will be a presumption that a person is aware of obvious risks, as was recommended in the Ipp report. Similarly, there will be no duty to warn of an obvious risk, providing that no written law requires such a warning in the particular case. Nor will there be any liability for the obvious risks of particularly dangerous sports and other risky

activities. The bill will also codify the current law so that there is no liability for the materialisation of inherent risks."[29]

51 The impact of the Act really does place on defendants the responsibility of identifying the risk as an obvious or an inherent risk and raising of the issue of whether a duty of care is owed or liability not found.

52 Section 5G of the *Civil Liability Act* sets out a rebuttable presumption. It says:

"**5G Injured persons presumed to be aware of obvious risks**

(1) In proceedings relating to liability for negligence, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.
(2) For the purposes of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

53 The meaning of "obvious risk" is derived from s 5 F of the *Civil Liability Act* which is in the following terms:

"**5F Meaning of 'obvious risk'**

(1) For the purposes of this Division, an '**obvious risk**' to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
(2) Obvious risks include risks that are patent or a matter of common knowledge.
(3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.
(4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable."

54 What is an obvious risk has been the subject of discussion in, at least, two cases in the Court of Appeal dealing with the *Civil Liability Act.* In *Jaber v*

[29] The Hon R J Carr MP, NSW, Legislative Assembly, *Civil Liability Amendment (Personal Responsibility) Bill,* 24 October 2002 at 5764

Rockdale City Council[30] at [35], Tobias JA (with whom Campbell JA and Handley AJA agreed) adopted this description of an obvious risk:

> "Whether or not a risk is '*obvious'* may well depend upon the extent to which the probability of its occurrence is or is not readily apparent to the reasonable person in the position of the plaintiff. Thus, … , I adopted the following definition of '*obvious*', found in the commentary to [343A] of the Restatement (Second) of Torts (1965) (Rest 2d Torts ¶343A):
>
> > 'Obvious' means that both the condition and the risk are apparent to and would be recognised by a reasonable man, in the position of the [plaintiff], exercising ordinary perception, intelligence, and judgment.' "

55 Tobias JA reaffirmed that definition in *Laolach v Ibrahim*[31] at [79], where he also said:

> "At [27] - [28] of my judgment in [*Jaber*], with which Campbell JA and Handley AJA agreed, I noted that the question of obvious risk involves the determination of whether the plaintiff's conduct involved a risk of harm which would have been obvious to a reasonable person in his position. The test is an objective one and thus must take account of the objective circumstances of the person whose conduct is being assessed."

56 A question has arisen as to whether, if a defendant wishes to rely upon the presumption in s 5G, it is necessary to plead it. There is a degree of debate about how the obvious risk needs to be stated. If it is stated as a broad generality, the risk will always be obvious: eg an obvious risk of rock climbing is falling. If it is stated with precision, that may not be so: eg the risk of falling whilst rock climbing when the fall is brought about by an earthquake in New Zealand causing the rock-face in the Blue Mountains to move, and dislodge the rock climber, may not be obvious at all. As well, the knowledge of the plaintiff of the generally stated risk, may well be different from the specifically stated risk.

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[30] *Jaber v Rockdale City Council* [2008] NSWCA 98

[31] *Laolach v Ibrahim* [2011 NSWCA 402] at [120]

57 Having regard to matters such as these, it seems to follow, in accordance with the principles about pleading to which I have earlier referred, that the defendant who wishes to rely upon the obviousness of the risk, and that the plaintiff actually knew of it, or else must be presumed to know of it, must plead those matters. However, it will be necessary for the plaintiff to have first pleaded, as s 5B requires, what the risk of harm is, that he or she is relying upon, to enliven the breach of duty.

58 And once a defendant pleads the fact of the obviousness of the risk, including identifying the risk, and how it is an obvious one, ie a matter of common knowledge, then in any reply, if that is necessary, the plaintiff can attempt to rebut the presumption (or asserted fact) by specifically denying any such knowledge, or dispute that it is a matter of common sense. Importantly then, the real issues in the proceedings are then identified, the relevant evidence can be placed before the court, and the parties have addressed and fulfilled their obligations to further the overriding purpose which is set out in s 56 of the *Civil Procedure Act* 2005.

59 Any pleading dealing with the rebuttable presumption needs to carefully consider the terms of s 5G(2) because first, a defendant needs to make a choice about the generality or specificity of the risk said to be obvious, and then the plaintiff needs to make a choice about the level and state of their ignorance. As McClellan CJ at CL said in *Carey v Lake Macquarie City Council*[32] at [71]:

> "The statutory scheme created by Div 4 of Part 1A of the Act is not expressed with clarity. … The effect of s 5G(2) is that a plaintiff is 'presumed to be aware of a risk where the risk would have been obvious to a reasonable person in the position of the plaintiff. A plaintiff cannot rebut the presumption by claiming that even though he or she was aware of the general risk of harm, he or she was not aware of all its possible manifestations, including the one that eventuated'. "

60 One of the principal reasons for the concept of obviousness of risk, is that s 5H removes the obligation of a defendant to warn of an obvious risk. In

other words, a plaintiff is now expected to be the *"… master of the bleeding obvious …"*. Section 5 H is in these terms:

> "**5H No proactive duty to warn of obvious risk**
>
> (1) A person ('the defendant') does not owe a duty of care to another person ('the plaintiff') to warn of an obvious risk to the plaintiff.
>
> (2) This section does not apply if:
> (a) the plaintiff has requested advice or information about the risk from the defendant, or
> (b) the defendant is required by a written law to warn the plaintiff of the risk, or
> (c) the defendant is a professional and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service by the defendant.
>
> (3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection."

61 In considering the question of pleading relating to an obvious risk, and the lack of an obligation to warn of such a risk, some of the terms are familiar.

62 Where a plaintiff pleads that the defendant failed to warn him or her of an identified risk of harm, then the defendant would be obliged to plead, first, that the risk of harm was an obvious one, and secondly, that as provided for in s 5H, he or she was not under any obligation to warn of that risk. In my view, a simple denial of negligence would be insufficient to enable a defendant to rely on these statutory provisions.

63 As Tobias JA said in *Jaber* at [21]:

> "Accordingly, the Council in seeking to rely on the provisions of Div 4 and 5 of Pt 1A of the CL Act should have indicated its reliance thereon "fully and clearly in its pleading".

CONCLUSION

64 Time does not permit of an examination of the provisions of Division 5 – Recreational Activities, of the *Civil Liability Act*, but I commend to you the

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[32] *Carey v Lake Macquarie City Council* [2007] NSWCA 4 at [71]

paper delivered on this topic by Stephen Campbell SC (as His Honour then was) which is available on the Bar's website.

65 Speaking generally, in respect of the provisions which have been examined in this paper, it is my view that the principles of pleading require defendants to specifically plead these provisions in a way which does significantly more than simply identifying them, and asserting reliance upon them. Such an approach conceals, rather than reveals, the true issues in dispute.

66 It is difficult to see that partial revelation of a defence actually fulfils the obligations falling on to parties, and their lawyers, which have statutory character in the *Civil Procedure Act*

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