

WARNINGS AND EXCLUSIONS POST PERSONAL RESPONSIBILITY

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Attempts to exclude or limit liability for personal injury in the context of sport and recreation traditionally have had only limited success. The Civil Liability amendments with their focus on personal responsibility for risky activities of a voluntary nature should provide additional scope for such limitation of liability. This article looks at the amendments and considers whether the first wave of cases decided under them suggests that the likelihood of enforcement is increased.

Introduction

Attempts to limit or exclude liability in sport by using tools such as exclusion clauses, disclaimers, waivers, indemnities or releases have been common in the context of sport and recreation because of the nature of sporting activities. Warnings have been used to prevent injury occurring with mixed legal results. Failure to warn has sometimes constituted negligence.

The courts traditionally took a strict approach when dealing with such attempts by organisers to limit liability, and the majority were not enforced. It was generally impossible to use them in the context of minors and others without legal capacity. The Trade Practices Act and other laws implied contractual warranties which could not be excluded.

A foundation of the sweeping civil liability amendments in Australia is the idea of personal responsibility for optional recreational activities. The civil liability amendments ("CLA amendments") are not uniform. They create new rules for dealing with risk, which change and clarify the rules on the nature and impact of warnings. They aim to make it easier to enforce exclusions and, in respect of some states, they create special, more restrictive rules for recovery of compensation in respect of injuries incurred in recreational activities¹.

This article looks at the CLA amendments from the perspective of sport and recreation. It considers whether the cases to date suggest that the new rules will make it easier for sporting organisations, operators of recreational activities and others to reduce liability for injury, as was the intention in enactment of these provisions.

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¹ For a useful history of the civil liability reform process, see Spigelman CJ, "The New Liability Structure in Australia", Swiss Re Liability Conference, Sydney 14 September 2004.

The old rules on warnings and exclusions

Both tort and contract have the capacity to provide a remedy where injury has been suffered in a recreational context.² There is a real tension between the philosophy behind the two legal areas in the context of exclusion or waiver of liability. Tort law is based on a duty not to cause injury and the concept of responsibility for wrongful actions, while contract law is based on the idea of freedom of contract, with any duty arising because of the agreement between the parties. In principle the parties should be able to contract to exclude all responsibility. A contractual relationship does not, however, preclude an action in tort, and, aside from its place as part of the tort scenario, a contractual relationship will only be relevant to the tort claim if the contract on its true construction has the effect of excluding or restricting the tortious claim. This will occur when an exclusion clause in the contract effectively excludes liability for negligence.

An important issue of policy in the context of the move to easier enforcement of blanket exclusions is the potential disincentive for organisations to fully embrace risk management where they know they will be absolved from liability for their own negligence by warnings or exclusions. While even at the most basic level one imagines that organisations would prefer to avoid the inconvenience and bad publicity of a serious accident or injury, one expects that this view may not always be shared by all employees and agents unless there is another incentive.

Warnings

The position of warnings in tort has been problematic, and raises a number of ideas. The first is that a disclaimer of liability is one of the factors to be considered when determining liability for injury. It may operate as a warning and be sufficient to discharge the duty of care. It may be relevant to the consideration of whether a duty of care exists.

It may indicate that risk has been assumed. Assumption of risk (or *volenti non fit injuria*) is a really a voluntary consent by a plaintiff, either expressly or by implication, to accept the dangers of a known and appreciated risk. The plea is based on knowledge, comprehension and appreciation of a risk in a particular set of circumstances. It operates to relieve the defendant of a duty to exercise care, and applies in relation to a legal risk in circumstances where a person assumes responsibility for his or her own safety. A successful plea of *volenti non fit injuria* actually negates the liability. Participating in a dangerous activity does not, however, involve an assumption of risk of all acts of

² For a more detailed analysis of the area in a historical context see Healey, D "Limitation of Liability in Sport", in Fewell (ed) *Sports Law: A Practical Guide*, Law Book Co Sydney 1995.

negligence.³ Conversely, the failure to erect a warning sign may in itself lead to a finding of negligence.⁴

Warning signs only serve a purpose if they are likely to inform a person of something that the person does not already know, or remind the person of something they may have forgotten or overlooked. The obviousness of the danger is important in deciding whether or not a warning is required.⁵ The erection of a misleading warning sign may create just as many or more problems than no sign.⁶ Recent decisions on the duty to warn by signage exhibit a trend towards denial of such a duty, although there are some exceptions.⁷ The High Court has reiterated, however, that whether a warning sign is necessary will depend on all of the circumstances.⁸

It was difficult traditionally to prove that a child voluntarily accepted the risks of an activity because this required proof that a child fully understood the nature and quality of the relevant risk.

Exclusions

Exclusion clauses may be relevant in situations involving contract, either where an exclusion is contained in a contract for entry to a venue or competition, or where the contract is simply an agreement not to sue.

Enforceability of an exclusion clause at common law depends upon whether the clause is incorporated into the contract and whether it is drafted in a way which clearly covers the situation faced by the person seeking to invoke it. Where a document is signed, a person may be bound by the exclusion whether or not he or she has read it.⁹ The party affected by the clause must have notice of it at the time of signing the contract or at the point of entry when the money is paid. A notice posted inside a stadium or dressing room will not be sufficient, as it will be too late. Previous dealings between the parties may complicate the issue - a regular user of premises may be taken to have accepted such a term. Where

³ *Rootes v Shelton* (1967) 116 CLR 383; see also *Fitness First Australia Pty Ltd v Vittenberg* [2005] NSWCA 376.

⁴ See *Romeo v Conservation Commission of NT* (1998) 151 ALR 263; *Vairy v Wyong Shire Council* [2005] HCA 62 (21 October 2005); *Shorten v Grafton District Golf Club Ltd* [2000] NSWCA 58.

⁵ *Vairy v Wyong Shire Council*, op cit, per Gleeson CJ and Kirby J at para 6 and 7.

⁶ *Council of the Shire of Wyong v Shirt* (1979-1980) 146 CLR 40.

⁷ See, for example, *Romeo v Conservation Commission of NT* (1998) 151 ALR 263; *Nagle v Rottneest Island Authority* (1993) 177 CLR 423 cf *Prast v Town of Cottesloe* (2000) WAR 474; *Vairy v Wyong Shire Council*, op cit; *Ballerini v Berrigan Shire Council & Anor.* [2005] VSCA 159 (22 June 2005).

⁸ See *Vairey v Wyong Shire Council*, op cit, at para 7 and 8 per Gleeson and Kirby JJ; cf Callinan and Heydon JJ at para 223.

⁹ *L'Estrange v Graucob* [1934] 2 KB 394; *D H Hill & Co Pty Ltd v Walter H Wright Pty Ltd* [1971] VR 749; *Toll (FGCT) Pty Limited v Alphapharm Pty Limited & Ors* [2004] HCA 52, 11 November 2004.

documents are not signed the courts will consider whether reasonable notice of the terms has been given.¹⁰

If the clause forms part of the agreement between the parties it will be interpreted having regard to its ordinary and natural meaning, read in the context of the contract as a whole, and giving due weight to the context in which it is contained. Ambiguities will be construed against those seeking to rely on the clause.¹¹

Contracts with children and others who lack capacity at law to contract are generally only binding if for their benefit, and it is unlikely that a contractual term excluding liability for personal injury is for a child's benefit, on its own or in the context of the overall agreement.¹²

The courts have considered the issue of exclusion clauses in a number of sporting contexts. The cases show that it is difficult to enforce a clause. The following cases are included to show the diversity of legal outcomes in circumstances involving exclusion clauses:

Skater injured by faulty floor: clause not enforced

In *Bright v Sampson & Duncan Enterprises Pty Ltd*¹³ a man claimed damages arising from a skating accident. He went to the rink with friends and paid for his admission. A sign at the door stated:

“No responsibility is accepted by the management for any injuries to patrons. Skating is at the patron's own risk, and is a condition of entry.”

The man was an experienced skater and was injured when his skates suddenly stopped after two hours of skating, apparently due to a problem with the floor of the rink. The Court of Appeal found that the clause on the sign covered only risks and injuries arising from skating, and did not cover risks arising from the condition of the premises. The sign was thus not effective to exclude liability in the circumstances.

¹⁰ *Thornton v Shoe Lane Parking Co Ltd* [1971] 2 WLR 585.

¹¹ *Darlington Futures Ltd v Delco* (1986) 161 CLR 500; *Toll (FGCT) Pty Limited v Alphapharm Pty Limited & Ors.*, op cit.

¹² See also *Minors (Property and Contracts) Act 1970*(NSW), which replaces the common law in NSW. Other states adopt the common law position with some modifications: see *Supreme Court Act 1986* (Vic), Div 4 of Part V; *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA).

¹³ (1985)1 NSWLR 346.

Parachute accident caused by agent: clause enforced

*Gowan v Hardie*¹⁴ involved a parachuting accident caused by the pilot of a drop plane who flew too close to the descending parachutist, causing her to panic. As a result, the parachutist fell more quickly and was injured. Identical and extensive exclusion clauses were contained in documents provided by the parachute training school and by the owners of the Parachute Association, both of which were involved in training the woman, setting up and conducting the jump. The clauses explained the dangers of the procedure, and expressly absolved all parties, their members, servants and agents from liability for injury. The documents were signed by the injured woman. The documents were found to effectively exclude liability of the pilot in the circumstances.

Gymnasium injury: clause enforced

Neil v Fallon was a case where a body builder unsuccessfully sued a gym and its employees for incorrect training methods. He had a pre-existing injury, and he informed the gym and trainers of it prior to contracting and during the several weeks in which he participated in the training. He signed a document which absolved the gym and its trainers from liability. The injury was caused by negligent instruction of a trainer. The court enforced the exclusion, despite the fact that another employee had misdescribed the content and the purpose of the clause, and despite there being processes in place for identifying and dealing with “at risk” participants which were not followed.¹⁵

Gymnasium injury: clause not enforced

In *John Dorahy's Fitness Centre P/L v Buchanan* a woman joined a gym, paid a fee and signed a document which was not able to be found for the hearing. After about 12 months, the member's original membership expired and she signed a new ‘membership agreement’ with printing on the back and front (although she thought it was only one page long). An exclusion was printed on the back. The judge found that the member's attention was never drawn to the conditions on the back which contained the exclusion. The member threw her copy away. She was injured by a faulty piece of machinery which fell on her head. She argued that there was negligence and also an implied condition in the membership agreement that premises and equipment would be as safe for use as reasonable skill could make them. The court assumed, based on earlier law and despite the fact that the member had not read these terms, that she was bound by the clause because she had signed the document. Mahoney JA (with whom

¹⁴ Court of Appeal (NSW) (Clarke, Meagher and Handley JJA) 8 November 1991; see also *Palmer and Jamieson v/as Byron Bay Skydiving Centre v Griffin* Court of Appeal (NSW) (Meagher, Handley JJA; Brownie AJA) 18 April 2002. It is unclear whether or not the outcome was affected by the nature of the sport, being particularly risky, in these cases.

¹⁵ Court of Appeal (Qld) (Fitzgerald P; Davies and Pincus JJA) No 82 of 1994; 20 February 1995.

Cohen AJA agreed) emphasised that in construing the effect of the agreement regard should be had to the nature of the contract and the “take it or leave it” nature of the bargain. His Honour characterised the terms and conditions as being those “... of which a party has and is expected to have no subjective knowledge or understanding”. The contract contained a warranty of good health, and clauses releasing the company, its employees and agents from claims relating to aggravation of medical conditions, and personal injury suffered by the negligence of the club, its employees, agents or other members. The contract also contained an acknowledgement by the member that the facilities were used at the member’s own risk. Mahoney JA found that the exclusion clause was effective to exclude liability for negligence but not for breach of contract when the ambiguity in the clause was construed against the party seeking to enforce it. This was despite the fact that the claim was for personal injury.¹⁶

Go karting injury: clause not enforced

In *Le Mans Grand Prix Circuits Pty Ltd v Iliadis* a person went to a go kart track for a corporate promotion. He signed a document described by organisers as a registration form in a rush. He thought that it would give him a licence to drive a go kart, and also that it was for marketing purposes. He was injured and took action for breach of s52 of the *Trade Practices Act 1974(Cth)* (Misleading or deceptive conduct), the equivalent s11 of the *Fair Trading Act 1985 (Vic)*, and the tort of negligence. The Court found that there was no contract of hire between the respondent and the victim and there was no evidence that any of the participants were referred to, or asked to read the exclusion clause. The clause, therefore, did not bind the victim.¹⁷

In each of these cases, the courts took the traditional approach to incorporation and interpretation of clauses: strict construction and construction *contra proferentem* - against the person seeking to rely on them. A number of judges seemed reluctant in principle to enforce the clauses as against the injured participant. The cases in which they were enforced related in general to more risky activities.

¹⁶ Court of Appeal (NSW) (Mahoney P; Cole JA, Cohen AJA) 18 December 1996. Mahoney P would have upheld a claim that the contract was unjust under the *Contracts Review Act 1980* (NSW) if he had found that the clause applied to the situation. Cole J (dissenting) found that the clause which exempted the club from liability for personal injury applied to cover the contract claim as well as the negligence claim. His Honour would have found the clause unjust within the meaning of the *Contracts Review Act 1980* (NSW) cf *Gowan v Hardie* op cit where a similar claim was rejected.

¹⁷ Court of Appeal (Vic) (Winneke P and Tadgell JA; Batt JA dissenting) 28 May 1998.

Civil Liability Amendments generally

The background to the extensive amendments to civil liability laws (“CLA amendments”) in Australia, including the difficulties with obtaining insurance and the detailed Ipp Report, is well known and documented and will not be discussed further here¹⁸.

The Ipp Report emphasised widespread support in the community for the idea that people who voluntarily participate in recreational activities as participants or officials like referees should take personal responsibility.¹⁹

The Ipp Report concluded that a principled reason could be given for treating recreational activities and services as a special category for the purposes of personal injury law, on the basis that people who participate in the activities “...often do so voluntarily and wholly or predominantly for self-regarding reasons.”²⁰

Ultimately, each state and territory considered its own CLA amendments. The Commonwealth amended the Trade Practices Act (“TPA”) to support the recommended state CLA amendments.²¹

Under CLA amendments in most states the position in relation to acceptance of risks is modified for all purposes.²² Some additional modifications have been made in some states to cover recreational activity. The recreational activity amendments contain both general and specific provisions which impact upon liability in sport and recreation and impact upon the likelihood of successful use of warnings and waivers.

Not all CLA amendments which might have some impact on sport and recreation are discussed here.

Several states allow providers of dangerous recreational activities to enter into contracts with participants limiting their liability.

The CLA amendments will be outlined below with some comment on their potential application, and by reference to jurisdiction as appropriate.

¹⁸ See, for example, Butler, D “A comparison of the adoption of the Ipp Report recommendations and other personal injuries liability reforms” (2005) *13 Torts Law Journal* 203; McDonald, B “Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia” (2005) *27 Sydney Law Review* 443; Commonwealth of Australia, *Review of the Law of Negligence Report*, Canberra, 2002 (the “Ipp Report”).

¹⁹ Ipp Report, op cit at para. 4.13.

²⁰ Ipp Report, op cit at para. 4.11.

²¹ The amendments relating to the *Civil Liability Act* 2002 (NSW) (“CLA NSW”) Divisions 4 and 5, Assumption of risk and Recreational activities, have been described by one commentator as the “cornerstone of civil liability reform”. See McDonald, op cit p.467.

²² NSW, Vic, Qld and WA have identical provisions on obvious risk.

Treatment of risk

Analysis of risk by the victim and the defendant is an important issue in the determination of negligence and yet characterisation of risk by the courts at common law has been not always been consistent.

The basic approach of the CLA amendments is categorisation of risk: the amendments characterise and define risks, and describe and clarify how each type of risk will be treated. Many of the amendments on risk are not directed expressly to sport and recreation, but impact upon it because recreation is likely to be risky.

Clearly the approach one takes as a sporting organisation or operator of a recreational business activity to the management of individual risks under the CLA amendments depends upon how one analyses individual risks. Categorisation of a risk as obvious, for example, will mean there is no need to warn in most states. Categorisation of risk as inherent means that there is no potential for liability in most states.²³ In these circumstances some certainty of analysis would assist organisations and operators to categorise and deal with their risk.

The amendments in relation to risk are set out below.

*There is no liability in negligence for inherent risks*²⁴

The Ipp Report drew a distinction between “inherent” and “obvious” risks, stating:

*“An inherent risk of a situation or activity is a risk that could not be removed or avoided by the exercise of reasonable care. An inherent risk may be obvious, but equally may not be.”*²⁵

Each of the states has a CLA provision on inherent risk. Under each of the provisions there is no liability in negligence for inherent risks, which are defined as risks which cannot be avoided by the exercise of reasonable care and skill. This reinforces the common law position that liability in negligence does not arise from an inherent risk, because there is no negligence when one

²³ *Wrongs Act 1958* (Vic) provides that this provision does not exclude liability in connection with a duty to warn of a risk: s55(3).

²⁴ CLA NSW s51; *Civil Liability Act 2003* (Qld) (“CLA Q”), s16; *Wrongs Act 1958* (Vic) (“WA V”) s55; *Civil Liability Act 2002* (WA) (“CLA WA”) s5P; *Civil Liability Act 1936* (SA) s39. WA V does not mention the words “and skill” in its definition, and also states that it does not operate to exclude liability in connection with a duty to warn of a risk (s55(3)).

²⁵ Ipp Report, op cit at para. 4.14, citing *Rootes v Shelton* (1967) 116 CLR 383.

cannot avoid the risk by taking care. The provisions apply generally and are not restricted to recreational activities.

What constitutes an inherent risk in particular circumstances may prove to be more problematical.²⁶ There are few CLA cases to date on the meaning of inherent risk. In one case under the CLA (NSW), for example, the judge talked of the steps which could be taken to alleviate inherent risks of BMX cycling, which under the CLA amendments appears to be a contradiction in terms.²⁷

In the context of a whale watching expedition advertised as gentle activity for a family, the swamping of the deck by a wave due to the negligence of the ship's captain was not an inherent risk of the activity within s5I of CLA NSW. On the contrary, and in a more logical decision, the court found that want of reasonable care and skill caused the injuries, so that inherent risk could not have been involved.²⁸

*There is no duty to warn of an obvious risk*²⁹

Obvious risk is a well accepted concept at common law. As Kirby J stated in *Romeo v Conservation Commission of Northern Territory*:³⁰

“Where a risk is obvious to a person exercising reasonable care for his or her own safety, the notion that the occupier must warn the entrant about risk is neither reasonable nor just.”

While later judicial comment has confirmed that this statement was not a proposition of law,³¹ it succinctly explains the rationale for the lack of duty to warn of an obvious risk. Important issues have arisen as to whether obvious risk is relevant to the existence or breach of duty, and importance of obvious risk to the question of breach.³²

The critical issue, however, once again, is the definition of obvious risk.

There are any number of cases on obvious risk in recreation at common law. The dual use of a velodrome for cycling and touch football, for example, was

²⁶As to the meaning of inherent risk, see, for example, the differing views of the members of the High Court in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460.

²⁷*Rigby v Shellharbour City Council & Anor* [2005] NSWSC 86 per Dunford J.

²⁸*Lormine Pty Ltd & Anor v Xuereb* [2006] NSWCA 200.

²⁹CLA NSW s5H(1); CLA Q s15(1); CLA T s17; cf WAV s54, which does not expressly negate duty but establishes a presumption that a person is aware of an obvious risk if *volenti non fit injuria* is raised in a proceeding. CLA WA s5O is also slightly different.

³⁰(1998) 192 CLR 431 at para 123.

³¹*Woods v Multi-Sport Holdings Pty Ltd*, op cit, per Gleeson J; *Hoyts Pty Ltd v Burns* [2003]77 ALJR 1934.; c

³²See *Romeo v Conservation Commission of Northern Territory*, op cit, cf *Woods v Multi-Sport Holdings*, op cit; *Vairey v Wyong Shire Council*, op cit.

said to be an obvious risk in a case involving the death of a touch football player who collided with a cyclist.³³

The High Court itself has divided on the categorisation of obvious risk.

In *Woods v Multi-Sport Holdings Pty Ltd*³⁴ the High Court Justices made a number of comments in their individual assessments of particular risks in the context of eye injury in a game of indoor cricket. Gleeson CJ described indoor cricket as an inherently risky activity. In relation to whether a warning should have been given about the risks of eye injury, his Honour agreed with the trial judge that the risk was so obvious that no warning was required. In reaching this conclusion his Honour focussed on eye injury, rather than injury generally. Callinan and Hayne JJ also found that reasonable care did not require participants to be warned of obvious risks in the circumstances. The majority thus took a broad view of the concept of risk in the circumstances. Hayne J looked at the risk of being hit by a ball when batting and found that it was obvious, stating that risk of injury would vary having regard to the part of the body that was hit. The dissenting judges (Kirby and McHugh JJ) thought that a warning should have been given because the risk of the particular type of eye injury suffered was not obvious. The facts were that in cricket a hard ball hitting the eye would generally fracture the eye socket. Here in indoor cricket, however, the injury was caused by a smaller more malleable ball which could be hit into the eye socket and significantly injure the eye itself, which was what happened. These judges focussed on the very specific risk which caused the injury in assessing whether or not it was obvious, rather than the fact that the sport itself entailed a number of risks.

The Ipp Report described the effect of its proposed amendments, which were taken up by most states, as follows:

*“...under current law failure to guard against an obvious risk may be negligent if the risk is not an inherent one. This makes it clear that the effect of Recommendation 11 may be to relieve a person of liability for failure to remove or avoid a risk that could have been removed or avoided by the exercise of reasonable care on their part... In other words accept a risk that another person will be negligent.”*³⁵

The rationale for the provision which dispenses generally with the need to warn of an obvious risk is that persons are assumed to have accepted obvious and hence known risks of an activity – under CLA in most states a rationale of voluntary assumption of all obvious risks automatically applies. Once again this

³³ *Canterbury Municipal Council v Taylor & Ors.*[2002] NSWCA 24.

³⁴ (2002) 208 CLR 460 at p 502, 509.

³⁵ Ipp Report, op cit, at para. 4.16, 4.17.

is not restricted to recreational situations, but is particularly relevant to recreation. The Victorian CLA is different as it does not expressly dispense with the need to warn of an obvious risk. (It does, however, contain the presumption discussed below where *volenti* is raised in a claim for damages in negligence.)

An “obvious risk” is defined under CLA amendments as a risk which would be obvious to a reasonable person or is patent or a matter of common knowledge. A risk can be obvious even though it has a low probability of occurring or if it is not prominent, conspicuous or physically observable.³⁶ Two state CLA amendments contain additional clarification. Queensland and Victoria provide, in addition to the standard definition, that a risk from a thing is not obvious “... if it is created because of a failure on the part of a person to properly maintain, replace, prepare or care for the thing unless the failure itself is an obvious risk”.³⁷

Injured persons are presumed to be aware of obvious risks unless they prove on the balance of probabilities that they were not aware of the risk. A person is presumed to be aware of the risk even if he or she 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.³⁸

The amendments thus establish a rebuttable presumption that a person suffering harm is presumed to be aware of any obvious risks of harm. Knowledge need not be specific to the risk but exists where the person has a general knowledge of the risk if not the precise risk.³⁹ Clearly the identification of the relevant risk for this purpose will have a great bearing on the application of the provision.

The Victorian provisions are slightly different. If the defence of *volenti* is raised and the risk of harm is obvious the person is presumed to have been aware of the risk unless he or she proves on the balance of probabilities that he or she was not aware of the risk.⁴⁰ This means that *volenti* must be raised as a defence before the presumption applies. A duty to warn of an obvious risk which would arise at common law expressly exists.

³⁶ CLA NSW s5F; CLA WA s5F; CLA Q s13; CLA SA s36; WA V s53; CLA T s15; see also *C G Maloney Pty Ltd v Hutton-Potts* [2006] NSWCA 136. These provisions mirror the views of the Ipp Report, *op cit*, at para 3.64.

³⁷ WA V s53(5). CLA Q s13(5). CLA Q also gives the examples of a go-kart and a bungee cord to illustrate. The former may create a risk to a user which is not obvious if its frame has been damaged or cracked in a way which is not obvious; the latter may create a risk that is not obvious if its cord is not replaced as recommended, or is used contrary to the manufacturer’s recommendations.

³⁸ CLA NSW s5G; CLA Q s14; CLA SA s37; CLA T s16; CLA WA s5N; WA V s 54, 56.

³⁹ CLA Q s14.

⁴⁰ WA V s54(1), (2); s56.

There are exceptions to the application of these provisions in most of the amendments- they do not generally apply to circumstances where the plaintiff has requested advice or information about the risk from the plaintiff, or the warning is required by law, or the defendant is a professional.⁴¹

The characterisation of risks as “obvious” will clearly be a key area in which the courts have the capacity to influence the breadth of liability and the following are examples of cases which have been decided to date under the CLA provisions:

- A mother travelling on a “whale watching” vessel with her family was severely injured when the vessel was swamped by a wave. The brochure promoting the activity promised gentle activity, so the court found that the risk was not “obvious”.⁴²
- An experienced child rider competing in motocross was struck by a following vehicle in circumstances where the Court of Appeal agreed that an insufficient number of marshals had been appointed and positioned on the track for the race. General practice was that marshals with flags were positioned at curves and jumps and warned following riders if a fall had occurred. The Court found that the injury would have been avoided if a marshal had been there using a flag. Bryson J, (using language which was a little imprecise as to the distinction between “inherent” and “obvious” risks), distinguished between a collision by an immediately following rider, which could not have been prevented, and collision after a significant interval which could have been prevented. The latter would likely fit the definition of an “obvious risk” as opposed to an inherent risk which is illustrated by the first situation.⁴³
- A seven year old climbed onto a trampoline wearing roller skates early in the morning while staying at the home of a friend. She fell off and was injured. Counsel argued that the concept of obvious risk was to be judged as though the child was an adult, and the concept of reasonableness was to be applied to a generalised reasonable person. Bryson JA⁴⁴ disagreed with this proposition, stating that the position of the person suffering the harm was relevant. Here this encompassed a child of seven with no

⁴¹ CLA NSW s5H; CLA Q s15; CLA SA s38; CLA T, s17; CLA WA s5O. WAV, s56 makes a distinction in relation to the burden of proving that a plaintiff is unaware of an obvious risk for work done and health services.

⁴² *Lormine Pty Ltd v Xuereb* [2006] NSWCA 200 (Mason P, McColl JA, Hunt AJA) 16 February 2006.

⁴³ *Macarthur Districts Motor Cycle Sportsmen Incorporated & Ors v Ardizzone* [2004] NSWCA 20 May 2004 (Hodgeson and Bryson JJA; Stein AJA.).

⁴⁴ With whom the other judges agreed on this and most other issues.

previous experience in the use of a trampoline or roller skates who chose to get up early and play unsupervised.⁴⁵

- A man who was the driver on a night kangaroo spotlighting and shooting expedition with friends was accidentally shot in the leg. He was not there to shoot. His friend left the car and returned with a loaded gun. The friend ignored requests for safe behaviour prior to the accident. The gun went off. A majority of the judges (Ipp and Basten JJA) found that the risk which materialised was not an obvious risk of the activity. Ipp JA decided that the activity for the purposes of risk consideration was that of sitting in the car knowing that from time to time shooters might enter the car with guns which may or may not be loaded. Basten JA determined that the risk which materialised was obvious, but that it was not an “obvious risk of a dangerous activity” for other purposes. Tobias JA (dissenting on this point) thought that the risk of the pistol being discharged in light of assurances about safety would be obvious only if there was reason for the victim to regard the assurances about safety as unreliable. In this case it was an obvious risk.⁴⁶

Following the detailed discussion of obvious risk in *Fallas v Mourlas*, the Court of Appeal considered the issue again in reversing the decision of the trial judge in a case involving a teenager diving from a bridge. The *Dederer* case (*Great Lakes Shire Council v Dederer & Anor; Roads & Traffic Authority of NSW v Dederer & Anor*)⁴⁷ involved a more simple factual setting than *Fallas v Mourlas*. A 14 year old boy diving from a bridge at which jumping and diving were common was catastrophically injured. The bridge was routinely used for jumping and diving despite a “no diving” pictograph sign displayed at each end.

The trial judge found that the obvious risk in this context was a reference to the risk of harm i.e. the injury resulting from the danger. Here the risk was not obvious when judged with respect to the position of a 14 year old seeing a large number of people jumping off the bridge without attempt by anyone to stop them.

On appeal, Ipp JA (with whom Handley and Tobias JJA agreed on this point) found that the risk in the circumstances as an obvious risk of a dangerous recreational activity and hence there was no duty of care owed by the Council.⁴⁸

⁴⁵ *Doubleday v Kelly* [2005] NSWCA 151 (Bryson JA; Young CJ in Eq and Hunt AJA) 12 May 2005.

⁴⁶ *Fallas v Mourlas*, op cit.

⁴⁷ [2006] NSWCA 101 5 October 2006.

⁴⁸ The victim sued the Council and the RTA. The claim against the RTA was not covered by CLA amendments because it was lodged before they applied. Ipp and Tobias JJA (Handley JA dissenting) found that the RTA owed a duty of care to the victim which was breached. The Court of Appeal increased the proportion in respect of contributory negligence of the victim from 25% to 50%.

His Honour cited from the judgment of Tobias JA in *Fallas v Mourlas*⁴⁹, to the effect that the test for determining this issue was to look at the particular circumstances in which the victim suffered harm and ask whether the risk would have been obvious to a person in his position. In this case, Ipp JA found that the risk in question was the risk of serious spinal injury flowing from the act of diving. Whether that risk was obvious had to be tested looking objectively at the position of a notional reasonable 14 and a half year old with the knowledge of the area and conditions possessed by the victim at the time.

His Honour characterised the findings of the trial judge as being that the victim:

“...knew of the risk that he might be injured by diving from the bridge but did not fully comprehend that the risk was of diving into shallow water and that the risk was of a serious injury to the spine.”

His Honour concluded that the findings fell within the meaning of s5G (2) – that the person was “...aware of the type or kind of the risk, even if the person was not aware of the precise nature, extent or manner of occurrence of the risk”.

His Honour also found that the pictograph sign prohibiting swimmers from entering the water head first would have been generally ineffective but would have warned a reasonable fourteen and a half year old that diving into the water was dangerous. He added that, with or without the sign, it should have been obvious to a reasonable person of his age that the dive was dangerous and could lead to catastrophic injuries. His Honour did not discuss the sign in the context of the definition of risk warning in the CLA (NSW).

There are significant inconsistencies between the decisions on the meaning of obvious risk at common law and it appears that this is likely to continue under the CLA amendments. Several issues of importance emerge.

The cases indicate that the issue of “obvious risk” is an objective consideration based on the reasonable person in the circumstances of the victim.⁵⁰ This is not a surprise but, as with the common law, the judges are far from unanimous in their consideration of the same circumstances - see particularly the individual judges in *Fallas v Mourlas*, and the reversal of the trial judge in *Dederer*, both discussed in detail above.

The issue of the place, if any, of gross negligence in the consideration of obvious risk is unclear. When one considers what a person taking part in an activity could be objectively assumed to have accepted, which is really the basis

⁴⁹ *Fallas v Mourlas* op cit at para 98. Ipp JA also referred to the judgment of Tobias JA in *Wyang Shire Council v Vairy; Mulligan v Coffs Harbour City Council* (2004) ATR 81-754 at p 65,892 to similar effect.

⁵⁰ *Macarthur Districts Motor Cycle Sportsmen Inc*, op cit; *Dederer*, op cit.

for the changes, it is unlikely to extend to gross negligence. If, for example, one takes part in a parachute jump one might be expected to assume the ordinary risks that the activity entails but not the risk, for example, that a parachute has not been included in the parachute pack given to the participant. If one takes a chairlift at the snow, one might be expected to accept the risks of falling off through clumsiness, or injuring a leg by catching it on some part of the machinery. One would not expect, for example, that the bolts holding the chair would not have been installed. This issue appears to have been anticipated in the definitions of obvious risk in Queensland and Victoria, but not in the other states.⁵¹

In *Fallas v Mourlas*⁵² Ipp JA distinguished between obvious risk of an activity and gross negligence, and said that the latter was not likely to have been accepted by a plaintiff. This is particularly interesting in light of his influence in the process of reform and the fact that the issue of gross negligence is not canvassed at all in the Ipp Review. His Honour suggests that it has some significance in the context of analysis of what is an obvious risk, the implication being that the risk of gross negligence cannot be an obvious risk. Some states have included consideration of gross negligence in their approach to CLA amendments, but most have not⁵³.

Determination of risk cannot take place without pinpointing the relevant activity. Some judges have taken a broad approach to identification of the relevant activity and thus the risk, while others have focused on a more specific aspect of an activity in considering the issue.⁵⁴ One judge considered the relevant risk to be the risk of the specific harm which was suffered, although this was overturned on appeal and a broader approach taken.⁵⁵

These questions are unlikely to be resolved in the short term, and there are likely to be other questions arising which will be equally important to the identification of “obvious risk”.

Special provisions on recreational activities: how are the activities defined?

A number of the CLA amendments are specifically aimed at recreational activities.⁵⁶

⁵¹ Op cit fn 35. Gross negligence is also factored into some CLA amendments on exclusion clauses, discussed later.

⁵² Op cit.

⁵³ See, for example, CLA WA s51 (2); CLA s5J; op cit, fn 47.

⁵⁴ See for example at common law different judges in *Woods v Multi-Sport Holdings Pty Ltd*, op cit; *Fallas v Mourlas*, op cit; *Mikronis v Adams* [2004] 1 DCLR (NSW) Dodd DCJ.

⁵⁵ *Dederer Roads and Traffic Authority*, op cit; *Great Lakes Shire Council v Dederer & Anor*, op cit.

⁵⁶ The Ipp Report expressly rejected suggestions that not-for-profit providers of recreational services should be given special protection for negligently caused personal injuries or death: para. 4.8ff.

The amendments generally recognise two types of recreational activity: “recreational activities” and “dangerous recreational activities”, although some states recognise only one or the other, and some none. Victoria has not adopted the Ipp Recommendations in respect of recreational activities.

A “recreational activity” is defined by the amendments in each state except Victoria very broadly.⁵⁷ In NSW, for example, it includes:

- *any sport, whether or not an organised activity;*
- *any pursuit or activity engaged in for enjoyment, relaxation or leisure; and*
- *any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people engage in sport or any pursuit or activity for enjoyment, relaxation or leisure.*⁵⁸

This range of activities is very broad and contains many activities which have no particular risk profile. It appears to include walking (possibly as long as it is not to work), shopping if for enjoyment, going to the opera, dancing, swimming laps, as well as the more risky pastimes which were the target of the legislation.⁵⁹ CLA NSW was drafted to give the broadest possible exclusions of liability in a recreational context.

Dangerous recreational activity

A “dangerous recreational activity” means a recreational activity that involves a significant risk of physical harm in NSW and WA, but a “significant degree of risk of physical harm” in Queensland and Tasmania.⁶⁰ It is not clear whether “significant” in this context will be measured by way of likelihood of injury or severity of outcome, although the placement of the words suggests the former. Several cases have considered the meaning of these words in NSW, but once again there is no consistent thread among the reasoning.

Not all jurisdictions draw the distinction between “recreational activities” and “dangerous recreational activities”. Those which do draw the distinction impose strict limits on the latter claims.⁶¹

⁵⁷ CLA NSW s5K; CLAT s19; CLA Q s18; CLA WA s5E.

⁵⁸ “Recreational service” is defined for the purposes of the Trade Practices Act, s68B (2), and is discussed below.

⁵⁹ The Ipp Report defines “recreational activity” as one which “involves a significant degree of physical risk”. This is more akin to the NSW definition of “dangerous recreational activity” but focussing on risk rather than “harm” which is in the NSW definition. See Ipp Report, op cit, at para 4.19.

⁶⁰ CLA NSW s5K; CLA T s19; CLA Q s18;

⁶¹ NSW, Queensland, Tasmania and WA provide that there is no liability arising from the obvious risks of a dangerous recreational activity.

The courts have considered “dangerous recreational activity” in the following situations:

- The judge in *Dederer*⁶², the case involving a young boy seriously injured when diving from a bridge into a river, found that diving from the bridge was a dangerous recreational activity without much further discussion.⁶³
- A whale watching expedition described as gentle and suitable for a family was not a dangerous recreational activity.⁶⁴
- Trail riding, not horse riding, was identified as the activity in a situation relating to a horse riding accident. Trail riding was a recreational activity but not a dangerous recreational activity.⁶⁵
- A person run over by a speed boat while spear fishing in a well-known fishing spot was not engaged in a dangerous recreational activity.⁶⁶

Two cases contained a more detailed analysis of the words, but once again the judges disagreed on the way in which the term is to be construed and the outcome.

*Falvo v Australian Oztag Sports Association & Anor.*⁶⁷ involved the sport of Oztag, a ball sport similar to rugby where there is no tackling and a participant is “caught” when a tag is pulled from his or her shorts by an opposing player. A participant was injured playing the sport on a local field which was topped up with sand where grass had worn away. The case involved a decision by Ipp JA, one of the authors of the influential Ipp Report⁶⁸. His Honour⁶⁹ stated that the definition of “dangerous recreational activity” in CLA NSW s5K had to be read “as a whole”, giving due weight to the word “dangerous”, and with the word “significant” bearing on both “risk” and “physical harm”. His Honour noted that neither an activity involving a significant risk of insignificant harm, nor an activity where the risk was slight even if the harm would be catastrophic, would fall within the definition. This activity involved everyday risks attendant on games which involve a degree of athleticism, with no tackling and no hard ball, so it was not a dangerous recreational activity.⁷⁰

⁶² Op cit. This finding was affirmed on appeal, op cit.

⁶³ His Honour did not consider, however, that the risk to the plaintiff from doing so was the obvious risk of a dangerous recreational activity at para 28.

⁶⁴ *Lormine & Ors. v Xuereb*, op cit.

⁶⁵ *Mikronis v Adams*, op cit.

⁶⁶ [2006] NSWSC 288.

⁶⁷ [2006] NSWCA 17.

⁶⁸ Hunt AJA and Adams J concurring.

⁶⁹ In a unanimous decision.

⁷⁰ At para.33.

A more complex set of circumstances and analysis was occurred in *Fallas v Mourlas*, the case involving spotlight shooting of kangaroos where the victim, Mourlas, was not a shooter but stayed in the car.⁷¹ In the New South Wales Court of Appeal, Ipp and Tobias JJA found that Mourlas had engaged in a “dangerous recreational activity”. Ipp and Basten JJA found that the risk that materialised was not an “obvious risk” of the dangerous recreational activity. The reasoning of each judge was different.

Ipp JA stated that whether an activity is “dangerous”, and that “significant” in the s5K definition is an objective decision, on a standard somewhere between trivial risk and risk likely to materialise.⁷² His Honour looked at the interaction between risk concepts in s5K and s 5L, distinguishing between a “significant risk” and an “obvious risk” in relation to the s5K definition. Factors such as time, place, competence, age, sobriety, equipment and even the weather may make dangerous a recreational activity which would not otherwise involve a risk of harm, and to ignore such factors would lead to unreliable, unfair and unjust outcomes. While a cliff walk in daytime may be safe, it may be dangerous at night. The relevant activity was the limited activity of sitting in the vehicle holding the spotlight for shooters outside, on the basis that at various times the shooters may enter the vehicle with guns which were or were not loaded. His Honour found that there was a significant risk that another man while getting in or out of the vehicle would handle a loaded weapon in a negligent manner, and hence it was a “dangerous recreational activity”. The injury did not, however, result from an obvious risk of that activity.⁷³

Tobias JA agreed that the activity was a dangerous recreational activity, and that the injury resulted from an obvious risk of a dangerous recreational activity.⁷⁴

Basten JA stated that the relevant recreational activity was kangaroo shooting at night, and someone driving was taking part in the activity. Here Fallas had failed to prove that there was a significant risk of injury occurring from an accidental discharge of a firearm in the circumstances. As to the interplay between activity and risk, his Honour stated that while a recreational activity may involve a number of significant risks of physical harm, at least one of those risks must materialise and result in harm for s5L to apply, and that risk must be

⁷¹ [2006] NSWCA 32.

⁷² At para 18.

⁷³ In the circumstances, however, the injury was not the result of the materialisation of an obvious risk. Given the warnings of Mourlas and various groundless reassurances given by Fallas, the eventual shooting was gross negligence. The reassurances had the effect of assuring Mourlas there was no obvious risk. In the circumstances, the correct question was whether the extreme conduct of Fallas was obvious and it was not.

⁷⁴ On the issue of whether the injury resulted from the materialisation of an obvious risk, his Honour characterised the risk of the pistol being discharged in light of Fallas’ assurances as being obvious only if there was reason to regard the assurances about safety as unreliable, and concluded that would be the case here.

an “obvious risk” within the meaning of s5F. Here the risk which materialised was obvious, but it was not an “obvious risk of a dangerous recreational activity”.

The judgments noted indicate quite different approaches to the interpretation of these provisions.

In summary:

- On the basis of comments made by the court in *Falvo*, it seems that sports involving tackling, or a risk of being struck by a hard ball, are likely to fall within the definition of “dangerous recreational activity.”
- On the basis of Ipp JA in *Fallas*, particular activities and circumstances resulting in the harm are relevant to determining whether an activity is dangerous.
- Whether there is an essential relationship between the obvious risk and the risk which makes an activity a dangerous recreational activity is unclear.
- The place of gross negligence in NSW is unclear.

Provisions dealing with risk in recreation

There are two ways in which the amendments affect recreational activities:

A defendant does not owe a duty of care in respect of a recreational activity if it is the subject of a risk warning

Following the amendments, in NSW and WA, a defendant does not owe a duty of care in respect of a recreational activity if it is the subject of a risk warning⁷⁵ As mentioned above, recreational activity is defined very broadly to include many sports and leisure activities, and even those which would not ordinarily have been thought to do so.

What is a risk warning?

A “risk warning” is defined as an oral or written warning which may be given by means of a sign or otherwise, and is reasonably likely to result in people being warned. It does not need to be specific to a particular risk and can be a

⁷⁵ CLA NSW s5M; CLA W s5L.

general warning of risks that include the type of risk concerned. Interpretation of this provision is likely to prove difficult as to the particularity of the risk and the nature of a “general warning” in this context.

When does a risk warning apply?

To enforce the risk warning there is no need to prove it has actually been received, but it must have been given by or on behalf of the defendant or the occupier of the place where the recreational activity took place. The representation must not have been contradicted by a representation made by or on behalf of the defendant. (There are some limitations in relation to activities which were required to be engaged in and those in contravention of laws, which are discussed below.)

The issue of use and effectiveness of a risk warning has been considered in a number of cases to date, where the traditional common law approach of the courts to interpretation has also been demonstrated.

In *Dederer*, the case involving a 14 year old boy diving from a bridge with catastrophic results, there were “no diving” pictographs posted at each end of the bridge in clear view of all potential jumpers. Dunford J found that these were not warning signs and in fact found that the defendants were in breach of their duty by failing to put up warning signs as the prohibition signs which had been posted were clearly ineffective. On appeal, in the context of overturning the trial judge’s decision and finding that the risk in the circumstances was obvious, Ipp JA (with whom Handley and Tobias JJA agreed on this point) his Honour referred to a number of common law cases relating to warning signs⁷⁶, and concluded:

“... the pictograph sign went so far as to prohibit swimmers from entering the water head first. It was generally ineffective. But it was a sign that, in my view, would have warned a reasonable fourteen and a half year old that diving into the water was dangerous.”⁷⁷

It is interesting in this context that the signs were found to be warnings but the warnings were generally ineffective. People were warned but the conduct did not stop.

There was no discussion of the relationship between the warning provision and the effectiveness of the sign in relation to the concept of people being likely to be warned.

⁷⁶ *Nagle v Rottnest Island Authority*, op cit; *Vairy v Wyong Shire Council* (High Court per Gleeson CJ and Kirby J.) op cit.

⁷⁷ *Dederer*, op cit, at para 170.

In *Mikronis v Adams*⁷⁸ the plaintiff fell off the horse on the trail ride when the saddle slipped because it was not properly secured. The activity was found to be a “recreational activity” (although not a “dangerous recreational activity”) and the Judge identified the risk as “the risk of the saddle slipping”⁷⁹.

The Judge noted the inconsistency in the CLA NSW between the requirement that the risk warning must have been given in a manner likely to result in the person being warned before engaging in the activity, and the fact that there is no need to establish that the person received or understood the warning or was capable of receiving or understanding it. The Judge stated:

*“... the warning can be put on a sign that the person never sees or reads before engaging in the activity but will only be given to the person if it is reasonably likely that the person will be warned of the risk. A clear example would be if the person is told to read a sign and does not do so. There will be situations that are not so clear.”*⁸⁰

The sign: warning ineffective

A sign had been fixed to the stable walls stating that horse riding was a dangerous activity, that all care and precautions were taken, but the activity was undertaken at a person’s own risk. Safety equipment was necessary for those under 18, as was a parent’s signature. The Judge found that even if the wording were sufficient, there was no evidence that the plaintiff had seen the sign or that her attention was directed to it. The Judge concluded that anyone could be forgiven for missing or ignoring the sign either because it was not seen or because it did not appear to be a warning. His Honour clearly found that the sign was not one in which was likely to result in the plaintiff being warned⁸¹.

Signed form: risk not covered

Similar wording also appeared on a form which the plaintiff was required to sign before setting off on the trail ride. The plaintiff entered her name and address and signed the form towards the bottom of one page, as did all other persons riding. The Judge found that this particular warning was given to her, but that the words were insufficient for the purposes of s5M. It warned of risk of personal injury- it did not warn of the saddle slipping, and to that extent it

⁷⁸ Dodd DCJ 1DCLR (NSW) 369. This District Court case involved a claim for extension of the limitation period in which to file proceedings for damages in relation to negligence in a horse riding accident while trail riding. In the course of considering the prospects of the plaintiff at trial, the Judge considered the definitions of “recreational activity” and “dangerous recreational activity” in s5K, the meaning of “obvious risk” in s5F. The Judge also considered a “risk warning” given by the operators of the stables from which the horse was hired, and whether it fell within s5M.

⁷⁹ At para 75.

⁸⁰ At para 85.

⁸¹ A defence related to an exclusion clause was also dismissed.

was not a “...general warning of risks that include the particular risk concerned”. If it had warned of the risks of equipment failure it may have been sufficient.

The Judge also determined that the words “... all care and precautions taken” were a contradiction of the risk warning within the meaning of s5M (8), stating:

“...if all care and precautions had been taken [the saddle] would have been properly fastened. If it had been properly fastened it would not have slipped. In my view therefore the representation by the riding centre that all care and precautions are taken contains by strong implication the representation that the saddle will not slip. Therefore the defendant would not be able to rely on the notice on the form even if it were held to warn of the relevant risk.”⁸²

Position of children and risk warnings

A risk warning in NSW may now be given to the parents or carer of a child or other person who is incapable in the eyes of the law of understanding such a warning and will be effective.⁸³ This means that previous difficulties in relation to children and others lacking capacity at law to appreciate the nature and quality of risk have been overcome. This means that if the parent or guardian of a child is given the risk warning, the child may be bound by it. A risk warning may also be given in WA, but not in respect of children under the age of 16.⁸⁴

Section 5M (9) draws a distinction in this context between events which a person is “required” to engage in. Compulsory work-related sporting or adventure team building activities would thus fall outside the scope of s5M. This is in line with the idea that those who get reduced protection have voluntarily accepted the risks of an activity, but will make life very difficult for institutions such as schools which might have a multi level structure of activities and liabilities in this context. It is unlikely that they will be unable to create a standard form document to cover all areas of risk which is likely to increase the risk of error in attempting to exclude liability.

The standard provision on warnings does not apply if the injured person has requested advice or information about the risk from the defendant, if the defendant is required by law to warn or if the defendant is a professional and the risk is risk of death or personal injury to the person.⁸⁵ There is no indication as to the way this provision applies to professional coaches or fitness trainers as the word professional is not defined.

⁸² At para 92.

⁸³ Section 5M.

⁸⁴ See definition of “child” in CLA WA, s51 (16).

⁸⁵ As happened, for example, in *Neil v Fallon*, op cit.

Voluntary school sport would presumably fall within the protections. One interesting consideration is whether, where some activity is compulsory, the choice of rugby over cross country running makes a sport a voluntary activity; debating might be chosen over water polo. Whether the activity needs to be completely voluntary is an interesting question.

A defendant is not liable for the materialisation of the obvious risk of a dangerous recreational activity

Some states provide that a defendant 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. This provision negatives the duty which the defendant might otherwise owe to the participant in the dangerous recreational activity. This is so whether or not the plaintiff was aware of the risk.⁸⁶

Presumably this protection flows to all defendants in an action arising out the obvious risk of a dangerous recreational activity.

This means that the distinction between an “obvious risk” and other risks will once again be the key to determining the limits of this provision and the provision in relation to warnings.

The kangaroo shooting case under NSW CLA, *Fallas v Mourlas*⁸⁷, involved interpretation of “dangerous recreational activity” and “obvious risk” with differing views being expressed by the Court of Appeal judges (Ipp, Tobias and Basten JJA).

Ipp JA noted that the significant risk that converts a recreational activity into a “dangerous recreational activity” may be an entirely different risk from the risk (which may be obvious or not) that materialises. His Honour characterised professional cricket as a dangerous recreational activity due to risks such as that of a batsman being struck by a bouncer, but distinguished a careless fielder whose return ball seriously injures batsman as not constituting a significant risk of physical harm. While the risk of to the batsman of being hit is an obvious risk, the outcome is that the fielder who established that cricket is a dangerous recreational activity, would have a defence under s5L if the injury resulted from the materialisation of an obvious risk. Boxing was characterised as a dangerous recreational activity because of possible heavy blows to head and body, but being punched in the kidneys after the bell is not the materialisation of a significant risk - but may be the materialisation of an obvious risk, raising a s5L

⁸⁶ CLA NSW s5L; CLA Q s19; CLA T s20; cf CLA WA s5H(1), which provides that the defendant is not liable for harm suffered “while the plaintiff is engaged in a dangerous recreational activity if the harm is the result of the occurrence of something that is an obvious risk of that activity.”

⁸⁷ Op cit.

defence. His Honour concluded that there is nothing in s5L that indicates that the obvious risk that materialises must be one of the significant risks that transforms a recreational activity into a dangerous recreational activity. Basten JA appeared to disagree with this latter proposition.

Waivers and other documents limiting or excluding liability

CLA amendments allow for some contracting out of liability in each of the jurisdictions, and the approaches of each jurisdiction are set out below.

The Trade Practices Act

Traditionally it has not been possible to implement exclusion clauses which fell within the ambit of the implied warranties in the Trade Practices Act (“TPA”), as it was impossible to exclude them. Section 74 of the TPA implied statutory warranties in relation to provision of services with due care and skill into certain contracts which could not be waived. Section 68 of the TPA did not generally allow these provisions to be excluded by contract in relation to the supply of services to a consumer – under the TPA anyone acquiring services of a kind ordinarily acquired for personal domestic or household use or consumption, or acquired for less than \$40,000. Where the goods or services fell within the scope of the provision merely because of the price threshold, redress could be limited to the resupply of the goods or services at the option of the supplier. Most recreational situations fell within the former category, which meant that in effect the implied warranty stood. Surprisingly claims for personal injury were rarely brought under these provisions, even where there was an exclusion which might apply to a tort claim.

Following the Civil Liability amendments, a new s68B was inserted into the Trade Practices Act. It allows providers of “recreational services”, as defined in s68B(2), to limit liability.⁸⁸ Recreational services are defined very broadly. For the purposes of the section, they are services:

- “... *that consist of participation in:*
- (a) *a sporting activity or a similar leisure time pursuit; or*
 - (b) *any other activity that:*
 - (i) *involves a significant degree of physical exertion or physical risk; and*

⁸⁸ *The Consumer Affairs and Fair Trading Act (NT)* provisions are similar to the TPA. See s66 (Warranties in relation to the supply of services), and s68A (Limitation of liability in relation to supply of recreational services). The latter allows limitation in the context of recreational services in relation to liability for death or personal injury if the exclusion etc is made known to the consumer when entering into the agreement and the person has a reasonable opportunity to consider whether or not to enter the contract on that basis.

- (ii) *is undertaken for the purposes of recreation, enjoyment or leisure.*”

Unlike some other definitions of recreational activity, this definition confines activities to those with “significant degree of physical exertion or physical risk”, which makes it narrower than, for example, the CLA NSW definition. Clearly it is only when there is a valid exclusion or waiver that the provisions will apply.

Issues are likely to arise of constitutional inconsistency between state and territory laws and this provision. There statutory provisions in other states and territories which exclude liability where injury is caused by obvious risk of a dangerous recreational activity potentially conflict with these provisions. There are provisions which deal with treatment of otherwise non excludable warranties in relation to the supply of services which potentially conflict with these provisions.⁸⁹

From a policy perspective, issues of acts of gross negligence are again relevant to these considerations, although this time not as to their likely acceptance by participants in the context of “obvious risk” but rather the fairness and logic of allowing protection for them by the sweeping exclusions which are likely to be allowed under these provisions. Under these provisions there is little incentive for suppliers to take care or engage in risk management. It is interesting that the limited exclusions which were always allowed by s68A in respect of acquisition of goods or services based solely on value are not enforceable if the person to whom the goods or services were supplied establishes that it was not fair or reasonable for the supplier to rely on that term. There are no such ameliorating provisions in relation to recreational services.⁹⁰ Prior to the enactment of s68B the Australian Competition and Consumer Commission (“ACCC”) argued that a better balance would be achieved between consumers and suppliers by ensuring that suppliers exercised a basic level of skill, requiring them to submit to an appropriate level of safety regulation, and adequately disclosing the risks of the activity.⁹¹

⁸⁹ See *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 388. These issues are too complex to canvas here but when combined with procedural and substantive differences between the jurisdictions are likely to lead to litigation.

⁹⁰ Section 68A (2). A list of factors relevant to the issue of fairness is contained in s68A (3).

⁹¹ Australian Competition and Consumer Commission, *Submission to the Principled review of the law of Negligence*, August 2002 at p23. See also comments of the Senate Economics Legislation Committee in relation to the Trade Practices Amendment (Liability for Recreational Services) Bill 2002 where similar views were put. However, the Committee also referred to the “conceptual and technical difficulties” involved in drafting the Bill so as to exclude “gross negligence” given that contract law does not accommodate concepts of negligence or gross negligence (at para 1.70ff).

New South Wales

In CLA NSW persons are not prevented from express provision of their rights and obligations even for liability in contract eliminating due care and skill in its performance. Section 5N provides that a contract for the supply of recreation services may exclude, restrict or modify any liability resulting from breach of an express or implied warranty that the services will be rendered with reasonable care and skill. It also provides that nothing in the written law renders such a term void or unenforceable or authorises a court to refuse to enforce such a term or to declare the term void. Lastly s5N provides that a term of a contract which provides that the person engages in recreational activity at his or her own risk operates to exclude liability for failure to exercise due care and skill.⁹²

At this stage decided cases show that the traditional initial hurdles of construction and interpretation will continue to create the major enforcement issues in relation to contractual exclusions despite the express in principle approval by the CLA NSW.

*Lormine v Xuereb*⁹³ involved a mother who went “whale watching” with her family as part of a group of 20 people, including children. The vessel was swamped by a large wave. She and others were sitting on the front deck. She was washed to back of boat and severely injured. The tour brochure described the waters as “calm” and claimed that the cruise was “suitable for all ages”. Participants could also go scuba diving. The trial judge found the captain negligent, and the shipowner vicariously liable for conduct of captain

On appeal, it was argued that a form headed “RELEASE OF LIABILITY, WAIVER OF CLAIMS, EXPRESS ASSUMPTION OF RISK AND INDEMNITY AGREEMENT” applied to relieve the shipowners and captain from liability for negligence.

The form specifically referred to waiver of rights and assumption of risk in relation to “diving and related activities”. It acknowledged that the participant would follow instructions in relation to the “sightseeing trip” but this was the only reference to sightseeing in the form. The form focussed most of its consideration on SCUBA diving, acknowledging competency of the participant in that regard, waiving all claims in consideration of being allowed to participate in SCUBA diving, and releasing the “Forster Fishermans Wharf Dive Centre” from any claims in relation to “SCUBA diving”, “snorkelling” or “skin diving”.

⁹²The provision does not apply if the harm resulted from the breach of a written law of the State or Commonwealth establishing specific safety processes (CLA NSW, s5N (6)).

⁹³Op cit.

In interpreting the document, Mason P applied the traditional rules for incorporation and construction of terms. When the families arrived at the dock for the trip, one of the adults was shown a form and asked to tick a space for every person in the party and to sign the form. The plaintiff ticked and initialled the form for herself, her husband and the children with them. The evidence was unclear on whether this occurred before or after the tickets were paid for, or whether anything was said at the time of payment about the content of the form. The plaintiff denied that she had read the form and stated that she had been told the ticked form related only to passenger numbers. (The trial judge had rejected the exclusion clause on the basis that the operator did not do what was reasonably necessary to give the plaintiff notice of the existence or content of the conditions).

On appeal, it was argued that this was the wrong approach, relying on the decision of the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*⁹⁴, where the High Court had affirmed earlier law that, absent other factors such as misrepresentation, a person contracting is bound by a signed contract regardless of whether or not they have read it. The victim invoked principles on strict construction of ambiguous wording in exemptions and also the contra proferentem rule⁹⁵.

Mason P found the contractual defence failed for the following reasons:

- The primary contract made the day before the cruise or on the day of the cruise did not contain the exclusion terms, nor was notice given that there were express terms to be incorporated;
- The oral communications that lead the plaintiff to sign the clause did not convey that the document was contractual or a variation to the existing contract- any contractual impact was misrepresented by the statement about head count;
- The clause relied upon was so ambiguous in context and standing that it was not a release from claims relating to sightseeing. It focussed on SCUBA diving and snorkelling and references to use of facilities and equipment should be read as references in connection to those activities.

⁹⁴ Op cit. .

⁹⁵ These rules are set out in cases such as *L'Estrange v Graucob* (2004) 219 CLR 165; *Wallis, Son & Wells v Pratt* [1911] AC 394; *Council of City of Sydney v West* (1965) 114 CLR 481, which were not referred to by the Court of Appeal.

Other relevant issues

His Honour made no specific reference in his decision to CLA NSW s5N,⁹⁶ discussed previously, which provides a court with a specific mandate to enforce exemptions of the kind attempted in the case.

The traditional judicial limits on what a court will be prepared to enforce seem to remain if the Xuereb⁹⁷ case is any indication. Although the inappropriate wording and inconsistent procedures were clearly important to the decision, no reference was made to s5N.

Refocussing on acceptance of risk, be it subjective at common law or objective under CLA, the “own risk” provision contained in s5N(3) is at odds with s5M(5), which provides that a risk warning must at least disclose the general nature of the particular risk to apply. Section 5N applies in contractual situations, and the logic of the provision appears to be that freedom of contract should allow persons to waive their rights or accept some kind of exemption or exclusion if they choose to do so. In practice, however, documents seeking to exclude liability are usually on a “take it or leave it” basis, so the participant has no real choice: there is little agreement. On the other hand, the operator seeking to enforce the waiver or exclusion would say that he or she would not be prepared to provide the activity except on the basis of some exclusion or modification of liability. Section 5M⁹⁸ specifically negates any duty of care in tort which might otherwise exist. In reality it provides a voluntary assumption of risk, without the traditional need for the acceptance of risk in full knowledge and appreciation of the risks, because the warning need not have been read or in some circumstances may be given to another on the participant’s behalf.

There is potential for overlap of the two situations in relation to the same recreational activity and there is likely to be some confusion about the extent of the requirement to specify either the risk, a risk of that nature or no particular risk. In neither of the two cases considered above was s5N considered, so there has, as yet, been no consideration of the relationship between s5N and s5M. All that can really be said is that at this stage the courts are still focussed on the traditional common law approach to interpretation of warnings and waivers.⁹⁹

The provisions reliant to minors and warnings are not mirrored in relation to exclusion clauses, which means that a parent cannot sign or accept an exclusion clause on behalf of a minor.

⁹⁶ CLA WA s5J; cf RSA SA s4-9.

⁹⁷ Op cit.

⁹⁸ CLA WA s5I.

⁹⁹ See also *Dederer v Roads and Traffic Authority*, op cit.

Victoria

The Victorian provisions are contained in the *Fair Trading Act*¹⁰⁰. They are similar to the TPA provisions in their application by price (\$40,000) and the nature of services supplied (goods of a kind ordinarily acquired for personal, domestic or household use or consumption) although the contracts are not specifically designated as consumer contracts.

Various terms are implied into these contracts, including conditions that services will be supplied with due care and skill, and that they will be fit for the purposes of services of that kind (s32J).¹⁰¹ Provisions which purport to exclude, restrict or modify the terms implied, rights created by them and liability of suppliers for breach are void. (s32L). Subject to s32MA and s32N, a contract is also void if it excludes, restricts or modifies the liability for damages, the amount of damages, purports to limit damages, requires a purchaser to indemnify a supplier for damages received or imposes other obligations as a prerequisite to the award of damages (s32LA). As with the TPA, where the goods or services falls within the scope of the provisions merely because of being below the price threshold, redress can be limited to the resupply of goods or services at the option of the supplier, unless the purchaser establishes that this is unconscionable (s32MA).

Specifically in relation to the supply of recreational services, s32N provides that a term of a contract is not void under s32L or LA by reason only that it excludes restricts or modifies the application of s32J or JA to the contract, if the exclusion:

- is limited to liability for death or personal injury; and
- the term contains the prescribed particulars (if any), and is in the prescribed form (if any) or is specified or is of a class specified in an Order made by the Governor in Council under s32NA (if any); and
- if there is a prescribed form for the term, the supplier has not made a false or misleading statement as to a material particular in relation to the term; and
- the term has been brought to the notice of the purchaser prior to the supply of the recreational services (s32N(1), (2)).

Despite s32N (1), a person cannot rely on the term of the contract set out above in relation to the supply where the person has done or omitted to do something

¹⁰⁰ Section 32N, NA.

¹⁰¹ These implied conditions are subject to other qualifications.

to which s32J or s32JA would ordinarily apply, and the act or omission was done with reckless disregard, with or without consciousness, for the consequences of the act or omission (s32N (3)).¹⁰²

The *Fair Trading (Recreational Services) Regulations* set out the acceptable wording for such waivers. It allows suppliers of recreational services to obtain express or implied consent to waive their rights under the FTA by including specified wording on a sign displayed at the place where the recreational services are supplied, in a notice given to the purchaser of recreational services, or in a signed waiver form. The wording warns the purchaser about what is being done, sets out the rights which are being foregone, and states that the waiver of rights does not apply to situations involving gross negligence.

South Australia

South Australia has taken a novel approach to the issue of liability in a recreational context by linking negligence to adherence to an established code of practice.¹⁰³

For the purposes of the provisions, “recreational service” is interpreted in the same way as the corresponding provision of the TPA¹⁰⁴. Activities such as horse riding, bungee jumping and other similar activities will fall within the definition.¹⁰⁵ Persons providing recreational services may apply to the Minister to have a code of practice setting out measures which ensure a reasonable level of protection for participants registered for a particular undertaking. The Minister may modify or cancel a code.

Once a code is registered, after a process of transparent review,¹⁰⁶ providers of recreational services on a commercial or non-commercial basis may register an undertaking to comply with the code.

The provider may then enter into contracts with consumers confining the duty of care to areas governed by the code, which becomes the standard of care owed to the consumer.

The duty of care owed to the consumer may be modified by way of contract or in a notice if the services are gratuitously provided. The consumer must be given notice required by the regulations of the fact that the duty of care is

¹⁰² These latter words are defined to mean “gross negligence” in the regulations.

¹⁰³ See *Recreational Services (Limitation of Liability) Act 2002*. The position in SA is discussed in Keeler J, “Personal responsibility and reforms recommended by the Ipp Report: ‘Time future contained in time past’” (2006) 14 *Torts Law Journal* 48.

¹⁰⁴ *Op cit* s2.

¹⁰⁵ Comment included as a note to the definition in the Act, and referring to the relevant Second Reading Speech.

¹⁰⁶ Section 4(4), 4(a), (b).

governed by the code. A consumer is taken to have agreed to the modification of the duty of care even where services are provided gratuitously.

If the consumer suffers personal injury, the provider is only liable in damages if the consumer establishes that the injury was caused or contributed to by a breach of the code.

The code will only apply to persons of full age and capacity. The definition of “consumer” in s3 of the Act provides that a consumer is anyone to whom recreational services are provided except a person who is not of full age and capacity.

This is the only way in which a provider of recreational services can modify or exclude liability.

The intention in enacting these provisions appears to be focussed on true high risk sports, although there is nothing to suggest that other activities cannot be the subject of a code. One assumes that various sporting organisations and industry associations within the sport and recreation industry would give serious consideration to the implementation of such a code.

Other jurisdictions

A brief comparison with other jurisdictions seems appropriate at this point.

United States

It has been stated in the context of waivers and exclusionary agreements in the US that:

*“Americans are under the false impression that the requirement of signing such forms is just a futile exercise by the provider to instil fear in the participant; that these forms are invalid in the eyes of the law, and that the participants’ rights remain intact after signing a release. However, in the context of recreational activities, many jurisdictions are upholding the validity of these exculpatory agreements.”*¹⁰⁷

The same authors state that in 1997 thirty six states had produced decisions upholding “exculpatory agreements” in the context of sporting activities, with

¹⁰⁷ Arango M and Trueba W, “The Sports Chamber: Exculpatory Agreements under Pressure” (1997) *U. Miami Ent. & Sports L. Rev.*1. See also Yasser, R *Sports Law Cases and Materials* 4th ed 2000 Anderson Publishing Co Ohio.

the most commonly used documents being waivers and express assumption of risk.¹⁰⁸

Enforceability is often considered by courts under criteria set out in *Tunkl v Regents of University of California*,¹⁰⁹ which was a case involving a hospital admission and a liability release. The plaintiff claimed injuries were suffered as a direct result of a negligent physician. The release in that case was found to be invalid as against public policy because hospital was providing an essential public service that placed users in a position of inferior bargaining strength.

The Tunkl test has not been uniformly adopted throughout the United States.¹¹⁰ Cases are, however, generally considered on the basis of public policy, with releases being upheld where activities are not “of great importance” or of “practical necessity”.¹¹¹

Other public interest factors include whether the defendant was performing a public service which was a practical necessity to some members of the public.

Cases involving sports are not generally in the public interest. The case of *Banfield v Louis*¹¹² is referred to by a number of commentators. There a cyclist competing in a race which was an essential part of US Olympic selection was severely injured in circumstances involving an exclusion clause as a condition of competing. She had previously complained to officials about the behaviour of the inexperienced competitor who ultimately caused her injury. The court characterised her activity as not essential, but a voluntary part time leisure activity, and enforced the exclusion. The conduct of competing was not in the performance of a public service, despite the fact that she was aiming to represent her country at a prestigious international sporting event.

It is suggested that in the sports context, courts are upholding exculpatory agreements as not against public policy focusing their analysis on both the sanctity of freedom to contract and the voluntary nature of the participant’s involvement.¹¹³

Rules on the nature of clauses and the way they must be brought to the attention of the participant appear similar to those in Australia¹¹⁴. The agreement must

¹⁰⁸ Op cit at p5.

¹⁰⁹ 32 Cal Rptr 33, 383 P 2d 441.

¹¹⁰ Casenote (1989) 102 *Harvard Law Review* 721 at 732.

¹¹¹ Ibid at 733, although other factors would also be relevant.

¹¹² 589 So.2d.441 (Fla. Dist.Ct.App. 1991)

¹¹³ Arango, op cit, at p9, citing *Banfield v Louis*, op cit; *Kotovskiy v Ski Liberty Operating Corp.* 603 A.2d 663 (Pa. Super.Ct.); *Marshall v Blue Springs Corp.* 641 N.E.2d. 92 (Ind.Ct.App. 1994).

¹¹⁴ “The release need not be perfect, but it must ‘constitute a clear and unequivocal waiver with specific reference to a [provider’s] negligence [to] be sufficient...[It must be clear, unambiguous and explicit in expressing the intent of the parties]. Moreover, ‘the law imposes no requirement that [the participant] have had a specific knowledge of the particular risk...’ not every possible specific act of negligence by the [provider

give the participant a general understanding of the inherent dangers involved.¹¹⁵ Although the concept of assumption of risk assumes that the participants assume only known risks, some courts have held that knowledge of a particular risk is unnecessary when there is an express agreement to assume all risk.¹¹⁶

Of interest, some cases suggest that a release may not, as a matter of law apply to gross negligence.¹¹⁷

Exclusions are almost always against public policy if they are signed by a parent on behalf of a child¹¹⁸ and the predominant case law indicates that they will not be enforced¹¹⁹ although there have been cases where such waivers have been upheld¹²⁰.

United Kingdom

The position in the United Kingdom is more restrictive than under the TPA and in most Australian states. Section 2 (1) of the *Unfair Contract Terms Act* (1977) expressly prohibits contracting out of liability for negligence resulting in death or injury. Negligence is defined to include the common law duty to take care or exercise reasonable skill, obligations arising from express or implied terms to take reasonable care, and occupier's liability at common law. The provisions apply where the provider is carrying on business in supplying the services. The provisions do not apply where death or personal injury results from a breach of contract or duty that can be or is committed without negligence. Terms which achieve the same result in a roundabout way are also prohibited. There is some scope for indemnities. Where the claim is not for personal injury or death a test of reasonableness is applied. Certain listed types of contracts, such as contracts of insurance, certain land dealings and certain contracts dealing with intellectual property rights are exempted from the provisions of the Act.¹²¹

must be spelled out in the agreement or discussed by the parties." Arango, op cit, citing *Black's Law Dictionary* 1289 6th ed 1990; *Paralift, Inc v Superior Court* 23 Cal. App. 4th 748, 755 (Cal.Ct. 1993).

¹¹⁵ Arango, op cit at p10, citing *Paralift, Inc v Superior Court* 23 Cal.App.4th 748 (Cal Ct. App. 1993).

¹¹⁶ *Boyce v West* 863 P.2d 592 598 (Wash.App.1993)

¹¹⁷ *Wade v Watson* 527 F.Supp.1049 (N.D.Ga.1981)

¹¹⁸ *Wagonblast v Odessa School District* 758 P 2d 968, *Scott v Pacific West Mountain Resort* 834 P.2d. 6, 11-12 (Wash 1992); *Cooper v Aspen Skiing Co* 48 P.3d 1229 (2002) "Parents can't waive child's right to sue for skateboard park injuries" *New Jersey Law Journal* (March 21, 2005) although it has been argued that this should not be the case: Nelson, R.S. "The Theory of the Waiver Scale: An argument why parents should be able to waive their children's tort liability claims" 36 *U.S.F. L. Rev.* 535(2002)

¹¹⁹ *Childress v Madison County* 777 S.W.2d. 1(Tenn. Ct. App. 1989); *Santangelo v City of New York* 66A.D. 2d 880, 411 N.Y. S 2d 666 (1978).

¹²⁰ *Hohe v San Diego Unified School District* 274 Cal.Rptr.647 (Ct App. 1990).

¹²¹ See Treitel, *Law of Contract*, 11th ed, Thomson/Sweet & Maxwell, London 2003 at p246ff. The *Unfair Contract Terms Act* 1977 also operates alongside the *Unfair Terms in Consumer Contracts Regulations* 1999, which give effect to EC Council Directive 93/13/EEC. They apply to contract terms which have not been individually negotiated, and are proffered in the course of the supplier's business. If terms are found to be unfair they are not binding on the consumer.

Conclusion

The CLA amendments are sweeping in their nature. The following questions have been posed about the NSW amendments, which are the most broad ranging of the amendments, but could apply to a similar or lesser extent in a number of other jurisdictions:

“Why governments would wish to allow commercial recreational providers to exclude liability for negligence including even the grossest failure to take care, and shift the costs of their negligence onto the public purse rather than bear them is at best puzzling... those who suffer from negligence could include the most vulnerable in our society: our children. It seems offensive to the fundamental values of a modern civilised society to include this shedding of responsibility in a ‘personal responsibility’ program.”¹²²

Some basic questions for organisers of sporting and recreational activities seeking to limit liability raised by the fragmented amendments across jurisdictions are:

- What is a recreational activity for the purpose of the relevant legislation?
- What is the relevant risk in the circumstances and what is its nature?
- How do I determine the approach to take?
 - if it is an inherent risk there is no liability?¹²³
 - if it is an obvious risk there may be no need to warn (although there is probably no downside to doing so)?
- Is the activity dangerous?
 - if the activity is dangerous there may be no liability for the materialisation of an obvious risk?
- If a warning is given, is it sufficiently specific to objectively inform a participant of a risk of the general kind which eventuates?
- Does my exclusion appropriately cover the type of risk involved?
 - have proper procedures been followed to incorporate the exclusion into the agreement with participant?
 - has the document been signed or its terms sufficiently brought to the attention of the participant?
 - have I complied with any other substantive legislative requirements or codes relating to enforceability?

¹²² See McDonald, op cit at p467.

¹²³ See, for example, the duty to warn in Victoria discussed previously.

- Can the exclusion apply to a minor in my jurisdiction?

Although most CLA amendments have now been in place for several years, emerging case law suggests that there are substantial differences in the approach of the judges in relation to its interpretation. Courts continue to take a strict approach when interpreting waivers and warnings, and other provisions and cases relating to risk and duty of care are so novel in a relative sense that it will take some time for interpretation to be clarified. Existing ambiguities in the common law only complicate these issues and show that certainty of outcome has not been enhanced by the amendments.

Aside from the many issues of interpretation which have begun to emerge, questions of policy which arise in relation to the new provisions include the following:

- Is the tension between voluntary assumption of risk and freedom of contract in balance in these amendments?
- Do different rules apply to gross negligence? Should consideration be given to further amendment to deal with gross negligence?
- As a matter of principle, and as a community, do we wish to exclude liability in a way which may diminish the inclination of organisations and operators to take care, to the detriment of risk management processes which might prevent accidents and injuries?

It is suggested that answers to the listed questions will not be forthcoming in the short term.