CIVIL LIABILITY ACT UPDATE[1]

EDMUND BARTON CHAMBERS SEMINAR SERIES

25 MARCH 2015

INTRODUCTION

1. Last week saw the 13th anniversary of the commencement of the *Civil Liability Act 2002* (NSW) (**CLA**).[2] In the time since its commencement a substantial body of case law concerning the operation of many of the provisions of the CLA has developed.

2. This paper discusses recent decisions of the New South Wales Court of Appeal which have considered the operation of the provisions of the CLA concerned with breach (ss.5B and 5C), obvious risk (ss.5F-5H) and contributory negligence (ss. 5R and 5S). Some general commentary will be provided on the operation of these provisions.

BREACH (AND THE RISK OF HARM)

3. Division 2 of Part 1A of the CLA (ss.5B and 5C) is entitled "Duty of care". It has been said that this heading is "apt to mislead" as the Division plainly deals with breach of duty.[3] The CLA does not directly address when a duty of care will be owed (or the scope or content of that duty). Regard must be had to common law principles in determining whether a duty of care is owed in a particular circumstance.[4]

4. Sections 5B and 5C provide as follows:

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[1] Olivia Dinkha, Barrister, Edmund Barton Chambers.
[2] *The Civil Liability Act 2002* (NSW) received Royal Assent on 18 June 2002, but by virtue of s.2 of the Act is taken to have commenced on 20 March 2002. Most of the provisions of the Act inserted by the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW) (which received Royal Assent on 28 November 2002) commenced on 6 December 2002.
[3] *Adeels Palace Pty Ltd v Mouarak*; *Adeels Palace Pty Ltd* (2009) 239 CLR 420 at [13].
[4] *Mamo v Surace* [2014] NSWCA 58 at [48] per McColl JA (Ward JA and Tobias AJA agreeing). See *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258; (2009) 75 NSWLR 649 Allsop P (at [102] – [103]) set out a number of factors to be considered in determining whether a duty of care exists in any given circumstance.

Division 2 – Duty of care

5B General principles

(1) A person is not negligent in failing to take precautions against a risk of harm unless:

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

(b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

(d) the social utility of the activity that creates the risk of harm.

5C Other principles

In proceedings relating to liability for negligence:

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and

(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

5. Section 5B does not of itself impose an obligation on a person to exercise reasonable care,[5] but rather it sets out three preconditions which must co-exist before there can be a finding that a person was negligent in failing to take precautions against a risk of harm.[6]

6. The effect of s.5B(1) is that a person is not negligent in failing to take precautions against a risk of harm unless the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); the risk was not insignificant; and in the circumstances, a reasonable person in the person's position would have taken those precautions. Section 5B(2) provides a non-exhaustive list of factors which a court is required to consider in determining whether a reasonable person in the person's position would have taken precautions against the risk of harm.

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[5] *Penrith Rugby League Club Ltd t/as Cardiff Panthers v Elliot* [2009] NSWCA 247 per Sackville AJA (Ipp and Basten JJA agreeing) at [22] referring to D Villa, Annotated Civil Liability Act 2002 (NSW) (2004) Law Book Co, at [1A.5B.050].

[6] *Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd* [2009] NSWCA 263; (2009) 77 NSWLR 360 (at [173]) per Campbell JA (McColl JA agreeing); see also (at [443]) per Sackville AJA.

7. Section 5B(1) requires that attention first be given to the identification of the "risk of harm". The need to accurately identify the risk of harm becomes apparent when one looks at the text of s.5B. The "risk of harm" which is required to be identified by the chapeau of s.5B(1) is the subject of each step of the inquiry into breach prescribed by s.5B.

8. In *Roads and Traffic Authority of New South Wales v Dederer*[7] Gummow J said:

> "The breach inquiry required the primary judge to identify accurately the actual risk of injury the appellant faced as it was only through the correct identification of the risk that her Honour could determine what a reasonable response to that risk would be."[8]

9. In *Shoalhaven City Council v Pender*[9] McColl JA said:

> "The influence of Gummow J's statement in *Roads and Traffic Authority (NSW) v Dederer* concerning the need to identify the relevant risk of harm accurately for the purposes of s 5B is apparent in recent decisions."[10]

10. ***Reid v Commercial Club (Albury) Ltd***[11] confirmed the test to be applied when identifying the risk of harm for the purpose of s.5B of the CLA.

11. In *Reid* the appellant was injured when she fell while walking to a dance floor in an auditorium at premises owned and occupied by the respondent. The dance floor was about 170mm lower than the adjacent floor on which the appellant was walking. The appellant did not see the step down to the recessed dance floor and fell. The appellant brought proceedings for damages for personal injury against the respondent, alleging that it had breached its duty of care to her. In finding for the respondent, the primary judge found that the appellant fell because she did not look where she was walking, that there had been no breach of duty by the respondent and that there was no causal connection between any breach and the damage suffered by the appellant.

12. The primary judge noted that s.5B required identification of a risk of harm, against which a person has failed to take precautions, and that it was

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[7] (2007) 234 CLR 330.
[8] Ibid. at [59].
[9] [2013] NSWCA 210.
[10] Ibid at [66].
[11] [2014] NSWCA 98.

important not to identify the risk "too narrowly". The primary judge identified the risk of harm as the appellant stumbling when she walked without looking where she was going.

13. On appeal the appellant contended that the primary judge erred in her identification of the risk of harm and contended that the risk of harm should have been identified as the risk of a person not observing the step and then stumbling off it.

14. Gleeson JA said:

> "[139] ... No complaint is made that her Honour did not correctly state the correct test — the relevant risk must be that which materialised in the case of the injured person seeking to claim negligence (Judgment at 32): see *Garzo v Liverpool/Campbelltown Christian School* [2012] NSWCA 151 at [7] (Basten JA) and [22]–[25] (Meagher JA).
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> [141] However, as the primary judge noted, the risk of harm was reformulated by the appellant in oral closing submissions as a risk of "stumbling down the step and suffering injury" (Judgment at 34). Her Honour observed, correctly in my view, that this formulation of the risk of harm was not particularly helpful, because any step or change of level poses a risk of stumbling, and the risk which materialised when the appellant stumbled and fell was not related to the physical layout or existence of the change in level.
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> [142] So much was accepted on appeal by the appellant whose written submissions argued that her case was not that the step could not be made out, rather that the appellant was not focused on the ground before her, the step was unexpected, and the visual cues were insufficient to draw her attention to the step: see [197] below in relation to Issue 3.
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> [143] In my view there was no error in her Honour's identification of the risk of harm."[12]

15. However, the task of identifying a risk of harm is not always easy and minds may differ as to the correct identification.[13]

16. In ***Jackson v McDonald's Australia Ltd***[14], the appellant slipped and fell on internal stairs at a McDonalds restaurant in the early hours of the morning. The appellant walked to the service counter of the premises (which involved ascending nine stairs within the premises) but turned around without buying anything and intended to exit the premises. As the appellant was in the process of exiting the premises he slipped and fell on the stairs which he had

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[12] *Reid v Commercial Club (Albury) Ltd* [2014] NSWCA 98 at [139] – [143].
[13] *Port Macquarie Hastings Council v Mooney* [2014] NSWCA 156 at [53] per Sackville AJA (Emmett JA and Simpson J agreeing).
[14] [2014] NSWCA 162.

earlier ascended. The floor walked upon by the appellant had been mopped a short time beforehand.

17. The appellant brought proceedings against the respondents claiming damages for personal injury. The appellant alleged that the respondents owed a duty to take reasonable care to avoid reasonably foreseeable risks of harm to customers entering the restaurant and that this duty was breached by mopping the floor in such a way as not to leave dry passages over which customers could walk.

18. The primary judge found that the respondents were not negligent. In doing so the primary judge identified the risk of harm as the risk that a plaintiff might slip.

19. On appeal, McColl JA said that this was an "insufficient description" of the risk of harm and that "[t]he breach inquiry required the primary judge to identify accurately the actual risk of injury the appellant faced as it was only through correct identification of the risk that her Honour could determine what a reasonable response to that risk would be".[15] McColl JA agreed with Barrett JA's description of the risk of harm as being that "a person would slip on wet floor or soon after walking through".[16]

20. However, Barrett JA also went on to state (at [96]) that "there was a foreseeable risk that shoes worn by someone proceeding from the direction of the counter, who had no choice but to walk across the wet area to reach the stairs and the exit, might retain moisture when the person came to negotiate the stairs". Ward JA agreed with this identification of the risk of harm (i.e. the one appearing at [96]) to which her Honour said she would add:

> "the risk that the soles of the shoes of someone crossing the mopped floor might retain not just moisture but also (or instead) some residue from the non-slip detergent."[17]

21. ***Lorrimar v Serco Sodexo Defence Services Pty Ltd***[18] highlights the importance of a court making clear findings on each of the issues posed by

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[15] *Jackson v McDonald's* [2014] NSWCA 162 at [17].
[16] Ibid. at [88].
[17] Ibid. at [96].
[18] [2014] NSWCA 371.

the staged inquiry into breach prescribed by s.5B, beginning with the identification of the risk of harm, and how the failure to do so may lead to a rehearing.

22. In *Lorrimar* the appellant, a cook employed by the Department of Defence at the Royal Australian Air Force Base at Williamtown, sustained burn injuries while cleaning a stainless steel bench at a kitchen at the Base in accordance with instructions allegedly devised by the respondent. The Department of Defence had contracted with the respondent to provide services in the kitchens at the Base. These services included providing work instructions to be followed by those cleaning the kitchens. The procedure prescribed by the respondent for cleaning stainless steel benches in the kitchen included washing the areas with a detergent solution and rinsing the areas with hot water. On the day of the accident, an equipment failure meant that there was no functioning hot water supply in the kitchen. Accordingly, the appellant used a 20 litre pot to heat 5-6 litres of water until "there was a kind of steam coming of it". The appellant tipped the water over the bench. In doing so, some of the water ran off the bench and into the appellant's boot.

23. The appellant brought proceedings against the respondent claiming damages for personal injury.

24. The primary judge found against the appellant on the basis, it would seem, that the respondent had not breached its duty of care to the appellant because the appellant had not complied with the system of work that the respondent had devised, and that the appellant's injury occurred when he short-cut the two-step procedure prescribed by the respondent by heating the water to boiling point in order to clean and rinse of the grease in one step. Such a case was not put to the appellant.

25. On appeal, the appellant contended that the primary judge erred in not affording him procedural fairness by deciding the case on a basis which had not been put to him. The appellant also contended that the primary judge failed, amongst other matters, to identify the risk of harm to which the appellant was exposed.

26. On appeal McColl JA (Macfarlan JA and Tobias AJA agreeing) said:

> "[95] Thus, although the primary judge addressed (at [40] ff) the appellant's submissions concerning breach of duty, he did not, with respect, engage with the first issue posed by that issue, namely whether there was, in the proven circumstances, a risk of harm: s 5B(1). It was only through the correct identification of the risk of harm that his Honour could determine what a reasonable response to that risk would be: *Roads and Traffic Authority of NSW v Dederer* (at [18], [59]) per Gummow J;*Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 ; (2002) 211 CLR 540 (at [192]) per Gummow and Hayne JJ. Absence of consideration at trial of the matters prescribed by s 5B of the CLA "may [be] reason enough to conclude that the question of breach of duty was not determined properly": *Adeels Palace* (at [39]).
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> [96] It is possible to read the primary judge's reasons as amounting to a conclusion that the appellant was injured because he deliberately devised his own system of cleaning the bench which entailed boiling the water to a temperature sufficient both to release the saturated fat and to sanitise the area, rather than first scouring, then rinsing the bench. However, this was not the case Serco advanced at trial nor, with respect, did Serco or his Honour put to the appellant questions warranting that conclusion. However it is clear that that conclusion was the basis upon which he decided the case adversely to the appellant.
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> [97] There are several difficulties with the primary judge's conclusions. The first is that because his Honour failed to identify the risk of harm at the outset of his factual inquiry, in my view he failed to appreciate, or engage with, the appellant's case on the risk of harm. That was that, absent a source of controlled hot water, heating water on a stove might lead to it being over-heated to the extent that it could burn a person in the appellant's position required to pour it over the benches — for whatever part of the cleaning task the appellant was seeking to accomplish."[19]

27. In *Lorrimar* the matter was remitted for a new trial on the basis that the primary judge had not given the appellant's case proper consideration.

28. ***Port Macquarie Hastings Council v Mooney***[20] illustrates how the identification of the risk of harm required by the chapeau of s.5B(1) impacts on the rest of the staged inquiry into breach prescribed by s.5B.

29. In *Mooney* the respondent was walking with her husband along an unlit gravel footpath at sunset. The footpath had been recently constructed by the appellant as a temporary measure pending construction of a new well-lit path. As the respondent approached a sharp deviation in the footpath (by which time it was "pitch-black"), she strayed from the footpath and fell into a stormwater drain. The respondent brought proceedings against the appellant claiming damages for personal injury.

30. The primary judge found that the appellant was negligent in failing to provide lighting or barriers near the deviation in the path.

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[19] *Lorrimar v Serco Sodexo Defence Services Pty Ltd* [2014] NSWCA 371.
[20] [2014] NSWCA 156.

31. The primary judge identified the risk of harm as being a risk that a pedestrian, particularly at night, would fall into the stormwater drain into which the respondent slipped. The primary judge further found that this risk was foreseeable, "not insignificant", and that because of the minimal cost involved, the appellant should have taken the precaution of placing wooden barricades with flashing lights in the area where the footpath veered across the stormwater drain.

32. Sackville AJA (Emmett JA and Simpson J agreeing) held that the primary judge erred in the identification of the risk of harm, which his Honour said was:

> "not a complete or accurate reflection of the circumstances of the respondent's injury or the risk of harm that materialised."[21]

33. Sackville AJA identified the risk of harm as follows:

> "[67] The risk of harm that materialised in this case was not, as the primary Judge's formulation perhaps implies, that a pedestrian might become disoriented in complete darkness and fall directly from the edge of the footpath into the stormwater drain. Nor was the risk of harm simply that a pedestrian unable to follow the path would inadvertently leave the footpath as it deviated sharply near the particular crossover traversing the stormwater drain and suffer injury as a consequence. The relevant risk of harm created by the construction or completion of the footpath was that in complete darkness a pedestrian might fall and sustain injury by reason of an unexpected hazard on the path itself (such as an unsafe surface or variation in height) or by unwittingly deviating from the path and encountering an unseen hazard (such as loose gravel, a sloping surface or a sudden drop in ground level). The risk of harm created by the construction of the footpath no doubt included the risk that a pedestrian would deviate from the footpath near the crossover and slip on loose gravel on the edge of the stormwater drain. But the risk of harm created by the construction of the footpath was not confined to the particular hazard that caused the respondent to suffer an injury."[22]

34. Sackville AJA found that the risk of harm was foreseeable and "not insignificant" (albeit "with some hesitation"). As to whether a reasonable person in the position of the appellant would have taken precautions against the risk of harm, his Honour said that while the installation of wooden barricades and flashing lights would have avoided the respondent's accident, to guard against the risk of harm the appellant would not merely have had to install barricades and flashing lights at the point where the footpath deviated sharply, but for a distance of at least several hundred metres where the footpath could be enveloped in complete darkness.

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[21] *Port Macquarie Hastings Council v Mooney* [2014] NSWCA 371 at [54].
[22] Ibid. at [67].

35. His Honour concluded that there was no evidence to support a finding that a reasonable person in the position of the appellant would have taken precautions against the risk of harm and said as follows:

> "[81] In my view, the primary Judge's finding that the Council breached its duty of care was based on an incorrect identification of the "risk of harm" and, despite the primary Judge correctly stating the legal principles, also focused unduly on the steps that could have been taken by the Council to avoid this particular accident. When the nature of the risk of harm is appreciated, the evidence is insufficient to support a finding that a reasonable person in the position of the Council would have taken precautions against that risk. It follows that the primary Judge erred in finding that the Council breached its duty of care to the respondent."[23]

36. *Mooney* illustrates how a wider identification of the risk of harm might tend to satisfy the first two preconditions in s.5B(1) (i.e. that the harm is foreseeable and not insignificant), but might fall short of satisfying the third precondition especially when regard is had to s.5C(a) which provides that the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible.

OBVIOUS RISK

37. The provisions relating to obvious risk are found in Division 4 of Part 1A of the CLA which is headed "Assumption of risk" (ss.5F-5I). Despite the heading, Division 4 of Part 1A does not replace the common law defence of *volenti non fit injuria.*[24]

38. Sections 5F-5H provide as follows:

> **Division 4 – Assumption of risk**
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> **5F Meaning of "obvious risk"**
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> (1) For the purposes of this Division, an **"obvious risk"** to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
> (2) Obvious risks include risks that are patent or a matter of common knowledge.
> (3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.
> (4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

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[23] *Port Macquarie Hastings Council v Mooney* [2014] NSWCA 371 at [81].
[24] D Villa, Annotated Civil Liability Act 2002 (NSW) (2013) Law Book Co, at [1A.Div4.030].

5G Injured persons presumed to be aware of obvious risks

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

5H No proactive duty to warn of obvious risk

(1) A person (**"the defendant"**) does not owe a duty of care to another person (**"the plaintiff"**) to warn of an obvious risk to the plaintiff.
(2) This section does not apply if:
(a) the plaintiff has requested advice or information about the risk from the defendant, or
(b) the defendant is required by a written law to warn the plaintiff of the risk, or
(c) the defendant is a professional and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service by the defendant.
(3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

39. Division 4 commences with a definition of "obvious risk" in s.5F. Section 5F defines an "obvious risk" as a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the plaintiff. Obvious risks include risks that are patent or a matter of common knowledge. Moreover, an obvious risk may include risks that have a low probability of occurring and ones which are not prominent, conspicuous or physically observable.

40. Section 5G creates a statutory presumption that a person was aware of a risk of harm if it was an obvious risk, unless the person can prove, on the balance of probabilities, that he or she was not aware of the risk. Section 5G does not of itself afford a defence.[25]

41. Section 5H provides that a person does not owe another person a duty of care to warn of an obvious risk. In doing so, s.5H provides one of two defences found in Division 4 of Part 1A. The other defence is found in s.5I. which provides that a person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk, being a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.

42. A finding that a risk was an obvious risk does not prevent a defendant from being held liable for a breach of a duty of care to take some precaution other

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[25] *Liverpool Catholic Club Ltd v Moor* [2014] NSWCA 394 at 74

than to provide a warning. However, the obviousness of a risk may be relevant to the question of breach as it may inform what precautions a reasonable person in the position of the defendant would have taken. However, that is not so because of Division 4 of Part 1A, but rather because of s.5B of the CLA.

43. In ***Liverpool Catholic Club Ltd v Moor***[26] the respondent was injured when he slipped and fell while descending a set of wet stairs which provided access to an ice rink at a sporting complex occupied by the appellant. At the time of the accident the respondent was wearing ice skating boots, the blades of which were longer than the tread of the steps. The respondent brought proceedings against the appellant for damages for personal injury and alleged that the appellant had breached its duty of care as occupier.

44. The primary judge found that the appellant was negligent in failing to take reasonable precautions against the risk of a person suffering injury from slipping and falling on the stairs while wearing ice skating boots. On the issue of the identification of the risk of harm, the primary judge also took into account the fact that the stairs were wet and that they had varying dimensions, which were said to have heightened the risk.

45. The primary judge found that the appellant should have provided one or both of two "warnings" to the respondent. The first was a warning (both in the form of a sign and a verbal instruction) that patrons should not put on their ice skating boots before descending the stairs. The third was a verbal or diagrammatic warning for patrons to adopt a modified walking technique known as a "duck walk" when negotiating the stairs and a statement alerting patrons that the risk of falling still remained with the modified walking technique.

46. On appeal, the appellant submitted that the primary judge erred in not finding that the risk of harm which materialised to the respondent was an obvious risk within s.5F of the CLA and that, by reason of s.5H of the CLA, the appellant did not owe a duty of care to the respondent to warn of that risk.

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[26] [2014] NSWCA 394

47. Meagher JA (Emmett JA and Tobias AJA agreeing) identified three difficulties with the primary judge's analysis of the issue. One such difficulty was that primary judge did not address whether the risk of somebody slipping or falling when descending the stairs whilst wearing ice skating boots would have been obvious to someone in the position of the respondent as required by s.5F(1). Instead, his Honour noted that the primary judge proceeded upon the basis that although such a risk would have been "clearly apparent", the risk to the respondent also involved the uneven dimensions of the stairs and the fact that they were wet. The primary judge considered whether the risk was obvious by focusing on whether the respondent had actual or constructive knowledge of these matters.

48. Meagher JA said:

> "The inquiry of as to the respondent's actual knowledge of those matters was irrelevant, except to the extent that how he acquired any actual knowledge may have been relevant to the forward looking inquiry as to whether the risk would have been obvious to a reasonable person in the circumstances of the respondent."[27]

49. Having found that the primary judge erred in the determination of this issue, Meagher JA went on to consider the question of obvious risk. In concluding that the risk was an obvious one within the meaning of s.5F, his Honour noted that although the respondent was not familiar with the appellant's ice rink, it would have been apparent to a person in the respondent's position that the risk of falling when walking down the stairs was significantly heightened by the fact that he was wearing ice skating boots, the blades of which were significantly longer than the tread of the stairs.

CONTRIBUTORY NEGLIGENCE

50. Section 5R of the CLA, which is found in Division 8 of Part 1A, provides as follows:

> **5R Standard of contributory negligence**
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> (1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.
> (2) For that purpose:
> (a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and
> (b) the matter is to be determined on the basis of what that person knew or

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[27] Liverpool Catholic Club Ltd v Moor [2014] NSWCA 394 at [32]

ought to have known at the time.

51. Section 5S (also found in Division 8 of Part 1A) provides that in determining the extent of a reduction in damages by reason of contributory negligence, a court may determine a reduction of 100% if it is just and equitable to do so. The effect of s.5S is that contributory negligence can defeat a claim for damages.

52. ***Allard v Jones Lang Lasalle (Vic) Pty Ltd***[28] reminds us that the test for contributory negligence is an objective one. In *Allard* the appellant slipped on a puddle of clear liquid located at shopping centre premises managed by the respondent, causing her to fall heavily and sustain severe injuries. The liquid had been left by a machine that was being used to clean the floor. Before her fall the appellant observed warning signs, which she knew indicated that cleaning was in progress, but assumed that the cleaning was limited to the areas between the signs. The appellant said that she was walking "quite fast" even after having seen the signs.

53. The primary judge found that the respondent was negligent and awarded the appellant damages in the sum of $303,974. In its defence the respondent pleaded contributory negligence, the particulars of which included a failure by the appellant to watch where she was walking and a failure to adhere to warning signs alerting her to the possibility of the surface on which she allegedly fell was slippery. The respondent further submitted that the loss and damage suffered by the appellant should be reduced by 100% in accordance with s.5S of the CLA. The primary judge rejected the respondent's claim that the appellant was guilty of contributory negligence.

54. The appellant appealed, challenging the primary judge's assessment of various heads of damage. By a cross-appeal the respondent alleged that the primary judge erred in rejecting its defence of contributory negligence, and asserted that the primary judge should have apportioned responsibility for the appellant's injuries equally between the appellant and respondent on account of the appellant's contributory negligence.

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[28] [2014] NSWCA 325

55. The primary judge's consideration of the issue of contributory negligence was limited to the following statement:

> "Contributory negligence is also alleged. The onus of proof as to contributory negligence is on the defendant. Having observed the CCTV footage, I am not satisfied the defendant has proved contributory negligence. There is nothing in that footage which showed that the [appellant] was not taking care for herself in walking towards the Woolworths entrance."[29]

56. The respondent submitted that there were three errors in the way in which the primary judge dealt with the issue of contributory negligence. The third error complained of by the respondent was said to stem from the primary judge's failure to undertake the necessary factual analysis called for by s.5R, by failing to, for example, ask what a reasonable person in the position of the appellant would have done in response.

57. Tobias AJA (Emmett JA and Adamson J agreeing) observed that the difficulty with the primary judge's findings on contributory negligence is that they purported to apply a subjective rather than an objective test to the issue. His Honour continued:

> "The question was not whether the appellant's response to the signs whereby she assumed that it was sufficient if she avoided walking between them was reasonable, but whether that was an appropriate response of a reasonable person in her position."[30]

58. Allowing the respondent's cross-appeal, Tobias AJA found that the appellant failed to take precautions against the risk of harm which a reasonable person in her position would have taken. The precautions included keeping a lookout for what was on the floor ahead of her and reducing her walking pace. Despite the view held by the appellant as to where the danger lay (that is, immediately between the two signs), his Honour said that:

> "Commonsense would then indicate that the floor may well be wet in areas other than that immediately between the two signs."[31]

59. While s.5R deals with when a plaintiff will be guilty of contributory negligence, it says nothing about how the relative culpability of the plaintiff and defendant

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[29] *Allard v Jones Lang Lasalle (Vic) Pty Ltd* [2014] NSWCA 325 at [79]
[30] *Allard v Jones Lang Lasalle (Vic) Pty Ltd* [2014] NSWCA 325 at [89]
[31] Ibid.

are to be determined. This exercise is to be determined by s.9(1)(b) of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) which provides:

> "the damages recoverable in respect of the wrong are to be reduced to such extent as the court thinks just and equitable having regard to the claimants share in the responsibility for the damage."

60. Applying the principles in *Podrebersek v Australian Iron and Steel Pty Ltd*,[32] Tobias AJA apportioned liability between the parties for the appellant's injuries at 20% to the appellant and 80% to the respondent.

CONCLUSION

61. In *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem*[33], wherein French CJ, Gummow, Hayne, Heydon and Crennan JJ stated:

> "If attention is not directed first to the Civil Liability Act ... there is serious risk that the inquiries about duty, breach and causation will miscarry."[34]

62. In *Laresu Pty Ltd v Clark*[35], Macfarlan JA (Tobias JA and Handley AJA agreeing) said at [42]:

> "In cases to which the Civil Liability Act applies, it is in my view important that a trial judge refers to its provisions to ensure that he or she adheres to it in his or her reasoning and that such adherence is apparent to an appellate court."[36]

63. I encourage you all to pay careful consideration to the provisions of the CLA and to actively engage with those provisions when drafting pleadings.

64. On the issue of breach, in my opinion it is essential that a plaintiff plead the risk of harm which the defendant should have taken precautions against. However, caution should be taken as to the identification of that risk of harm. A narrow identification of the risk of harm might satisfy s.5B(1)(c), but fail on the first two pre-conditions being that the risk of harm is foreseeable (s.5B(1)(a)) and not insignificant (s.5B(1)(b)).

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[32] [1985] HCA 34; (1985) 59 ALR 529 wherein Gibbs CJ, Mason, Wilson, Brennan and Deane JJ held (at 532 – 533): "The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man ... and of the relative importance of the acts of the parties in causing the damage..."

[33] (2009) 239 CLR 420

[34] Ibid. at [39]

[35] [2010] NSWCA 180.

[36] Ibid at [42]

65. A defendant wishing to rely on a defence of "obvious risk" ought to plead the relevant provisions of Division 4 of Part 1A and identify how, by reference to the identified risk, it was an obvious one.

66. Finally, on the issue of contributory negligence, defendants must plead the manner in which the plaintiff failed to take precautions against the risk of harm.

67. Recently I had occasion to examine a defence wherein the defendant's allegation of contributory negligence was limited to the following:

> "Further and in the alternative the defendant says that if the plaintiff suffered injury, loss and/or damage as alleged (which is denied) then such injury, loss and/or damage was caused or contributed to by plaintiff's failure to take reasonable care for her own safety.
>
> **Particulars of contributory negligence**
>
> (i) Failing to take reasonable care in the circumstances.
> (ii) Putting herself in a position of peril."

68. In my opinion particulars of contributory negligence of this kind are so general as to be almost meaningless. The abovementioned pleading does no more than to assert a reliance on a defence of contributory negligence but does not reveal, in any meaningful way, the true issues in dispute.

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