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CIVIL LIABILITY ACT 2002 (NSW) – 2016 UPDATE

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The provisions of the *Civil Liability Act 2002* receive frequent attention at appellate level in NSW. This seminar will concentrate on recent decisions regarding 3 aspects of the Act:

A. Public Authorities
B. Recreational Activities
C. Obvious Risk

These are the areas in which, in the author's view, there have been the most significant developments and worthwhile analysis provided by the NSW Court of Appeal in 2015.

A. NEGLIGENCE AND PUBLIC AUTHORITIES (PART 5)

In assessing whether an authority should be liable compensate a plaintiff, the law of negligence recognises its obligations have a different complexion to those of a private individual.

An authority will necessarily have more than one master and therefore its actions are informed by a multifarious set of considerations, far broader than those of a private defendant. Hence the 'reasonable public authority' is afforded different treatment before the law.

The provisions of part 5 of the Act bring to bear a set of principles that reflect this difference.

Section 41 Definitions

A "*public or other authority"* is broadly defined to include:

- the Crown
- Government departments
- Public health authority
- a local Council
- Any body prescribed by the regulations (eg. private schools).
- '…any person acting in a public official capacity (whether or not employed as a public official)…' (*eg*. Doctors acting exercise of their discretion whether or not to detain a patient under the *Mental Health Act* 2007 *cf*. *Presland v Hunter Area Health Service* [2003] NSWSC 754; *McKenna v Hunter & New England Local Health District* [2013] NSWCA 476 - overturned by HCA but on a separate issue).

Section 42 Principles concerning resources, responsibilities etc of public or other authorities

The following principles apply in determining whether a public or other authority has a duty of care or has breached a duty of care in proceedings for civil liability to which this Part applies:

(a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions,

(b) the general allocation of those resources by the authority is not open to challenge,

(c) the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate),

(d) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.

Purpose of Section 42

At its heart the section acknowledges that authorities have limited financial resources with which to perform their various functions[1]. It also acknowledges that the decision as to how these monies are allocated towards each of those functions is more often than not political, and therefore should not necessarily be open to judicial scrutiny. As Gleeson CJ said in *Graham Barclay Oysters Pty Limited v Ryan* (2002) 211 CLR 540 at [6]:

Decisions as to raising revenue, and setting priorities in the allocation of public funds between competing claims on scarce resources, are essentially political.

...

When courts are invited to pass judgment on the reasonableness of governmental action or inaction, they may be confronted by issues that are inappropriate for judicial resolution, and that, in a representative democracy, are ordinarily decided through the political process.

[1] A "function" is defined in section 41 of the Act to include "a power, authority or duty".

However, once the decision not to allocate resources strays into the realm of specific (vs general) such that it has been made with knowledge (or ignorance) of the potentially adverse implications that the spending decision might have, then it is less likely to be immune from the law of negligence.

Section 42 - 'General' v Specific Allocation of Resources

Whether section 42 (a) and (b) affords the authority protection requires analysis of how the allegation of negligence is put. That is:

i. Is there, implicit within the allegation, the contention that the authority should have allocated its resources differently, so as to eliminate the risk (ie. spent money to remedy the problem beforehand)?

ii. If so, is the heart of the complaint one with respect to the 'general' allocation of resources or the specific. This will be a question of fact in any given case. Some examples help to bear out this distinction.

In *RTA v Refrigerated Roadways* [2009] NSWLR 360, Campbell JA did provide an example of general allocation he thought may come within section 42. In that case a object was thrown, hitting the windscreen of a car travelling on the freeway below and causing it to crash. In response to an allegation of negligence in failing to erect screens on the overpass to prevent objects from being thrown, the RTA claimed that its failure to do so was a consequence of its reasonable resource allocation among the many and varied obligations it had with respect to maintenance and safety of the roads.

Although the case was decided on a different basis, Campbell JA ventured an extensive analysis of section 42 in the context of the facts of that case. He said that:

> *401 In the present case, if one allegation had been that the RTA misapplied well-established principles and made careless factual errors in the way it prioritised overpasses for screening, and that a principled and careful prioritisation process would have put the Glenlee Bridge close enough to the top of the priority list to have been screened before 23 August 1998 with the money that the RTA actually chose to spend on bridge screening, the challenge that was being made would have been to the allocation of resources that the RTA had actually allocated to bridge screening. I do not think that such a challenge would be one to the general allocation of the resources reasonably available to the RTA for the purpose of exercising its functions.*

If for example, that same analysis revealed there were a number of bridges that required screening, none more deserving that the other, and there was a limit to the resources available for that purpose, then a failure that resulted from say, the screening not having taken place yet (some other bridges already having been screened as part of that general spending allocation to screening), it is arguable that this scenario fits into the more general kind of spending allocation to which section 42 is directed.

Recent section 42 decisions

In *Holroyd City Council v Zaiter* [2014] NSWCA 109 Hoeben CJ at CL was asked to find that the Council's failure to erect a fence alongside an open canal on a sportsground was the result of a general allocation of resources and therefore protected by section 42.

Council had in place a policy that only the revenue from a nearby advertising pole sign would be allocated to the improvement of the whole sportsground. The failure to erect the protective fence was the result of there being insufficient funds from that revenue source to pay for the fence. This, it said, was a decision about the general allocation of its resources and therefore not subject to challenge.

The Court (Hoeben JA) rejected this argument and found that the reasonableness of a decision that the revenue from the advertising pole sign was to be the sole source of funding for the sports ground was more in the nature of a decision regarding the specific allocation of resources rather than a general one. That decision, his Honour found, was an unreasonable one and Council should therefore be liable for the failure to erect a fence.

By way of side-note, the decision appears to run counter to the words quoted from *Graham Barclay Oysters* above, it being a decision '*as to raising revenue, and setting priorities in the allocation of public funds between competing claims on scarce resources'*.

In *Collins v Clarence Valley Council* [2015] NSWCA 263, the appellant fell when the tyre of her bike was caught in a gap between the planks of a bridge. The Court of Appeal rejected her argument that given the Council had spent over $300,000 on the bridge in question immediately after her accident (from a budget $15 million), it should have been obvious that it needed to do so prior to the accident. The Court found that the appellant could not point to any evidence that indicated the bridge in question should have been afforded higher priority than other bridges for which the Council was responsible. Therefore, the plaintiff's case on breach fell foul of section 42, being a challenge to the general, rather than specific, allocation of the Council's resources.

Section 43A

Section 43A prescribes that if the alleged negligence involves the exercise of a "special statutory power", in order for the authority to be liable, its actions, or inaction, must have been:

> *...so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.*

This loudly echoes the *Wednesbury* test, the rationale being that which was stated by Lord Hoffman in *Stovin v Wise* [1996] AC 923:

> *In the case of **a mere statutory power**, there is a further point that legislature has chosen to confer a discretion rather than create a duty …[b]ut the fact that the Parliament has conferred a discretion must be some indication that the policy of the act conferring the power was not to create a right to compensation. The need to have regards to the policy of the statute therefore means the exceptions will be rare.*

However, in recent times section 43A has come under close scrutiny and on occasions the Court has deemed itself unfettered by the limits of the section in finding for plaintiffs.

"Special Statutory Powers"

An essential starting point is to consider whether the matter complained of truly involves the exercise of a 'special statutory power'. It is defined in the section itself as being a power:

(a) conferred by statute; and
(b) one which persons are not generally authorised to exercise without specific statutory authority.

Common statutory powers might involve something as simple as the decision whether or not to erect a traffic sign (but not all signs cf: *Rickard v Allianz Australia Insurance Ltd* [2009] NSWSC 1115 at [112] for what qualifies).

Curtis v Harden Shire Council [2014] NSWCA 314

In performing road works, Harden Shire Council had covered the surface in a layer of loose gravel. A woman lost control of her vehicle whilst driving on the road in question

and fatally collided with a tree.

Proceedings were brought by her de facto partner for negligence on the part of the council for failing to erect either a reduce speed sign or a slippery road sign. Though there were signs warning of roadwork, there were also 'no lane' markings and signage warning of chip hazards but no reduce speed or slippery road sign.

The Court found that (Per Basten JA at [279]:

> *...the court must view the matter through the eyes of a responsible public authority, having particular expertise and functions.*

Therefore, the Court of Appeal established that it is not the judge's own views on reasonableness that decide the 43A question. Instead, the court must stand in the shoes of the reasonable council officer. In *Curtis* the court found that any reasonable council officer would have erected the relevant reduce speed/slippery road signage and Council was found to be negligent.

Whilst this would ordinarily be a matter for expert evidence, the plaintiff in this matter had the good fortune of have an ex-Council engineer as a witness in whose view the failure to erect the relevant signage was not a sound one.

RMS v Grant [2015] NSWCA 138

A motorcyclist struck the 'nose' of the median strip and, *inter alia*, alleged failure to properly signpost/provide visual aids.

The plaintiff adduced expert evidence to the effect that there was an applicable Australian Standard recommending a 'keep left' sign be used, although the Standard did not make it mandatory. The plaintiff's expert conceded in cross-examination that the question of whether or not signage should have been erected involved an 'engineering judgment'. Therefore, the Court found that the level of 43A unreasonableness had not been reached

because as Basten JA stated at [36], rather than being a matter of judgment, the test will only be met if:

> *...no traffic engineer acting reasonably would have failed to take the precaution identified by the plaintiff.*

Following on from his judgment in *Curtis*, Basten JA expanded further on the test in 43A (at [35]-[37]) setting out 3 elements:

1. His Honour emphasised the need to assess section 43A unreasonableness by reference to the limits beyond which a "hypothetical reasonable public authority" would not step, this being a matter for an expert.
2. It is a test formulated in the negative. That is, the court must be satisfied that "*…no person with the requisite expertise could properly consider the omission to be reasonable*." This is to be contrasted with the approach under section 5B(1)(c) of the *Civil Liability Act*, which asks what a reasonable traffic engineer would have done in response to an identified risk. This is the way the trial judge formulated the question (said to be incorrect at [54]): "*Could an authority properly consider the act or omission a reasonable exercise of the power?*"
3. The section reformulates the standard by which breach of duty is to be judged. The plaintiff will need to establish negligence that goes above and beyond the ordinary statutory standard of care. The plaintiff bears this onus of proof.

The question of how reliance on the section should properly be pleaded by an Authority was also dealt with (at [17] and [18]). Firstly, the basis on which the defendant is brought within the definition of "public authority" set out in section 41 should be identified. That is, the reason the defendant is a "public or local authority constituted by or under an Act". Secondly, each of the pleaded acts or omissions said to attract the protection of section 43A should be identified and with respect to each, the matters bringing such an act or omission within the scope of a 'special statutory power' described.

The Court's judgment clearly confirms the position that, following on from *Curtis*, expert evidence from a suitably qualified traffic engineer will be required in order to enable the court to stand in the shoes of a suitably qualified council officer acting reasonably.

Section 45

Section 45 of the Civil Liability Act 2002 (the **Act**) provides:

> ***45 Special non-feasance protection for roads authorities***
>
> *(1) A **roads authority** is not liable in proceedings for civil liability to which this Part applies for harm arising from a failure of the authority to **carry out road work,** or to consider carrying out road work, unless at the time of the alleged failure the authority had **actual knowledge** of the **particular risk** the materialisation of which resulted in the harm. [emphasis added]*
>
> *(2) ...*
>
> *(3) In this section:*
>
> ***"carry out road work"** means carry out any activity in connection with the construction, erection, installation, maintenance, inspection, repair, removal or replacement of a road work within the meaning of the Roads Act 1993.*
>
> ***"roads authority"** has the same meaning as in the Roads Act 1993.*

Definition of 'Public Road'

For the purposes of the *Roads Act* (section 7) subject to certain exceptions, "*the council of a local government area is the roads authority for all* ***public roads*** *in the area*".

In *Cavric v Willoughby Council* [2015] NSWCA 182 a woman was injured when her shopping trolley hit a pothole in a car park. The Council was successful at first instance relying on the immunity provided by section 45. The plaintiff put in issue the question of whether the car park constitutes a public road so as to render the Council a roads authority for the purposes of section 45. The trial judge found that it was and found for the Council.

On appeal, the Court of Appeal addressed the question of how the question of whether a space was a 'public road' should be established in evidence. The definition of 'public road' in section 7 of the Roads Act requires a public road to be officially opened and dedicated or declared as such.

There was no evidence of this, and though the Council provided some support for the inference that this was in fact how the land was being used (ie. by both pedestrians and cars), the Court found that this was not enough.

The effect of this decision is that ordinarily, documentary evidence that shows a space is officially a 'public road' will be required. This will have implications for how plaintiffs and defendants will plead and evidence their respective arguments regarding section 45 in certain future cases.

"Actual Knowledge"

The NSW Court of Appeal has emphatically stated on more than one occasion that any allegation of s45 actual knowledge must be properly pleaded and particularised by the plaintiff: *Colavon Pty Limited trading as Thormans Transport v Bellingen Shire Council* [2008] NSWCA 355 at [98] and *Porter v Lachlan Shire Council* [2006] NSWCA 126 at [41]. This can be a catch-22 for pleading the initial statement of claim because it may take subpoenaed material to prove actual knowledge.

"Actual knowledge" must be found in the mind of an officer within the council having the authority to carry out the necessary repairs: *North Sydney Council v Roman* [2007] NSWCA 27 (per Basten JA with Bryson agreeing).

In *Roman* the Court rejected the argument that given street sweepers knew about the hazard that caused the injury, "actual knowledge" existed within the Council itself.

The section 45 "actual knowledge" question arose again more recently in *Collins v Clarence Valley Council* [2015] NSWCA 263. The court confirmed the position established in *Leichhardt Council v Serratore* [2005] NSWCA 406 to the effect that 'actual knowledge' can be established by way of inference and if the inference is fairly available and no evidence is called to rebut it, the court more comfortably make that finding. This makes the plaintiff's already difficult task somewhat easier.

"Particular Risk"

Council must also have actual knowledge of the "particular risk" the plaintiff is alleging. In *Botany Bay Council v Latham* [2013] NSWCA 363, the plaintiff alleged that a particular paver was uneven or irregular and that it caused her to trip. The Court found that the plaintiff would have to show the Council had actual knowledge of the issues with that particular paver rather than a general awareness that the footpath in the area had some irregularities (at [46]).

In the appeal proceedings in *Collins* the Court re-visited this issue and noted that that decision was a product of the manner in which the plaintiff's case was pleaded. That is, the plaintiff's identification of a *particular* paver as the risk causing the injury, meant that the 'particular risk' was more narrowly identified in that case.

The Court in *Collins* (at [164]) confirmed that the judge at first instance (Beech-Jones J) had correctly adopted the position that for the purposes of section 45 that the 'particular risk' corresponded with the risk of harm identified to assess breach of duty under section 5B(1) of the Act.

B. RECREATIONAL ACTIVITIES (PART 1A DIVISION 5)

Alameddine v Glenworth Valley Horse Riding Pty Ltd [2015] NSWCA 219

In *Alameddine* the plaintiff was injured in a group quad biking excursion. At first instance the primary judge found that the instructor sped up on the way back to the finishing point causing the plaintiff, in her attempt to keep up, to lose control and crash.

Glenworth had taken numerous precautions to protect itself from suit. These included:

i. A waiver contained in the application form;
ii. A risk warning at the point where the participants were waiting to be allocated a quad bike; and
iii. An oral warning given by the instructor himself.

The trial judge found that the waiver included in the application form the plaintiff's mother had signed on her behalf was enough to protect *Glenworth*.

CHANGE SLIDE

However, the NSW Court of Appeal (Macfarlan JA with Simpson JA and JC Campbell AJA agreeing) soundly knocked down the several statutory defences contained in part 1A Division 5 of the Act which Glenworth alleged, so as to reverse the trial judge's decision.

Section 5L provides a defence if the harm suffered by the plaintiff is the result of "*the materialisation of an obvious risk of a dangerous recreational activity*". Therefore the question arose as to whether the quad biking was a '*dangerous recreational activity*'.

There is some useful commentary on how the question of what is a "*dangerous*

recreational activity" should be determined taken from a prior decision of the Court in *Falla v Mourlas* [2006] NSWCA 32. It is to the effect that the totality of circumstances should to be taken into account. As such, what is or isn't defies any clear categorisation.

In the present case, the contents of Glenworth's website proved problematic on this point. The website described the activity as 'surprisingly easy' and requiring 'no experience'.

Therefore, despite the defendant having adduced expert evidence in support of its assertion, saying that quad bikes are inherently unstable and susceptible to rolling, the Appeal bench was not persuaded. It therefore found section 5L didn't apply because *this* kind of quad biking wasn't a "dangerous recreational activity".

However, even if it was a dangerous recreational activity, the Court called on some pre-*Civil Liability Act* decisions involving ice skating rinks ('skating is at the patrons' own risk') to find that if the '*materialisation of an obvious risk*' defence was to apply, the risk in question had to be one which was '*inherent*' in the activity itself.

Reference was also made to the a decision mentioned above, *Holroyd City Council v Zaiter*, where it was observed that 5L was inapplicable because the risk associated with riding a bike down a steep hill was that of the rider falling off and hitting his head on the ground or bike. The risk that eventuated was falling a distance of two metres into an unfenced concrete canal, which was of course, not inherent to the activity itself.

Applying that position to the facts in *Glenworth*, the Court found that the instructor's conduct in accelerating so as to cause the plaintiff to go outside her comfort zone was not a risk inherent to the activity as promoted by Glenworth. On the same basis the Court also knocked out section 5M, which deals with risk warnings "*in respect of a risk of the activity*". The instructor's conduct was not inherently "*a risk of the activity*", the Court found.

The Court then dealt with section 5N of the Act and contractual waivers. In this regard the Appeal Court took the view that the primary judge had made a wrong finding of fact that the contract had been entered when the application form, which included the waiver, was signed on the plaintiff's behalf. The contract, it said, had been formed when the plaintiff's mother had made the booking and provided payment over the telephone the previous day. This is consistent with the old '*ticket cases*' in contract law. Therefore, the waiver was not part of the contract and fell outside the reach of 5N.

Another basis the Court identified for refusing to recognise the waiver was its wording:

> "*….any such injury may result not only for your actions including physical exertion but also from the action, omissions or negligence of others*".

The Court noted the waiver did not specifically refer to the exclusion of liability for negligence on the part of the defendant, Glenworth but only made a general reference to the '*negligence of others*'. Applying the *contra preferentum* rule it was deemed ineffective.

Sharp v Parramatta City Council [2015] NSWCA 260

The plaintiff was injured jumping from a 10 metre diving platform at a public swimming pool. Her case at trial was that the defendant should not have allowed her to run and jump from the platform in to the pool. Instead she alleged she should have been properly instructed and supervised (even though there was someone on the platform supervising) or simply not allowed to do it at all.

The case again examined risk warnings under section 5M of the *Civil Liability Act*. The risk warning in this case took the form of a sign affixed to a pillar adjacent to the stairs leading up to the dive platform that read:

> "*patrons using the platforms and springboards do so at their own risk*"

Though this warning could not be more general in its scope, the Court found it was adequate. The use of the word 'using' the platform could only refer to jumping or diving, which is what caused the plaintiff's injury (at [31]).

The Court also had no trouble finding that the prominent location of the sign would have meant that a reasonable person in the plaintiff's position would have seen it before choosing to jump (as the section at 5M(3) requires).

The decision is also consistent with the ice skating rink decisions cited in *Glenworth* (at [44]), where the Court looked at whether the injury was the result of an action that was 'inherent' to the recreational activity to itself; or outside it. In *Trevali P/L v Haddad* [1989] Aust Torts Reports 80-286, for example, the distinction was drawn between '*pushing and jostling*', as distinct from deliberate pushing, as an incidental to skating in such a venue. A generalised risk warning would cover the former, though not the latter.

By choosing to jump off the platform, the plaintiff was engaged in an action inherent to the activity itself, and therefore one that was contemplated by the warning. In any event, it is hard to imagine that such a sign was even necessary, which raises the question of obvious risk.

There was also a dispute as to whether for the purposes of section 5L, the plaintiff was engaging in a 'dangerous recreational activity' and that such a risk would have been obvious to a reasonable person in the position of the plaintiff (as per definition of 'obvious risk' in s 5F).

The Court had no trouble answering either of those matters in the affirmative. The 'obviousness' component was supported by the fact of the warning sign, the appellant's own evidence to the effect she was aware she could suffer injury from impacting with the water and what the Council's expert said. Section 5K requires that there be 'a significant

risk of physical harm' to be deemed a 'dangerous recreational activity'. Without reference to the evidence, the Court made it's own call on this question.

Though appropriate in the facts of this case, a finding that supervised jumping from a 10m platform involves a 'significant risk of physical harm' appears to bring the realms of what is 'dangerous' in NSW tort law very much into the everyday.

C. OBVIOUS RISK

The Court of Appeal recently provided a definitive analysis of what makes a risk 'obvious' in *Collins (supra)* including the following:

> *[138] 'Obvious' means that both 'the factual scenario facing the plaintiff' and 'the risk are apparent to and would be recognised by a reasonable [person], in the position of the [plaintiff] exercising ordinary perception, intelligence and judgment.' That means the Court will take into account, for example, the age and level of experience of the plaintiff. Whether or not a risk is 'obvious' may well depend upon the extent to which the probability of its occurrence is or is not readily apparent to the reasonable person in the position of the plaintiff. A risk may be 'obvious' even though it has a low probability of occurring and is not prominent, conspicuous or physically observable.*
>
> *[139] As I have said, prima facie, the plaintiff's actual knowledge of matters which constitute the risk of harm is irrelevant, except to the extent that how any such knowledge was acquired may be relevant to the forward looking inquiry as to whether the risk would have been obvious to a reasonable person in his or her position. However, as the 'obvious risk' inquiry is into the knowledge that a reasonable person in the appellant's position should be taken to have had, it may be relevant to know the extent to which he or she was actually aware of the risk in whole or in part. That 'would be a circumstance to be taken into account when*

considering what would have been obvious to a reasonable person in the position of the respondent'.

The key aspects of the test for obvious risk as set out in *Collins* are:

1. It requires a prospective analysis (without the benefit of hindsight);
2. Though it's an objective analysis, the particular characteristics of the plaintiff such as 'age' and 'level of experience' must be taken into account;
3. The plaintiff's actual knowledge, or not, of the factual matters said to render the risk 'obvious' are relevant to the question of whether to a reasonable person this risk would have been obvious; and
4. A risk may be obvious even though it has a low probability of occurring and/or not conspicuous.

This test was recently applied in *Schultz v McCormack* [2015] NSWCA 330.

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