

BRIG the Hon Justice Paul Brereton, RFD
Judge of the Supreme Court of New South Wales
Commander, 5th Brigade

**LAW IN THE OUTDOOR
ENVIRONMENT
- DUTY OF CARE**

RECREATIONAL RISK

- ◎ The law recognises that many beneficial recreational activities legitimately involve risk:
 - “Many forms of outdoor recreation involve a risk of physical injury. In some cases, while the risk of injury is small, the consequences may be severe. ... A general prohibition in a given locality may be a gross and inappropriate interference with the public's right to enjoy healthy recreation” Gleeson CJ, *Vairy v Wyong SC*
 - “These remarks apply equally to horse riding, and horse riding by young children. ... Our society accepts that certain recreational activities may be provided for young children, and even encouraged, albeit that they involve risks of serious injury” Ipp JA, *Ohlstein v Lloyd*

SCOPE

- ◎ Civil liability
 - General concepts and principles
 - *Civil Liability Act* and recreational activities
- ◎ Occupational Health & Safety
- ◎ Safety in outdoor activities
- ◎ Dealing with the fallout

CIVIL LIABILITY

**GENERAL CONCEPTS
AND PRINCIPLES**

CIVIL LIABILITY

- ◎ Damage caused by breach of duty of care
 - Duty of care
 - Breach of duty
 - Causation of harm

DUTY OF CARE

- ⦿ Duty to use reasonable care to avoid foreseeable harm to a person (plaintiff) to whom duty is owed.
- ⦿ Whether duty is owed depends on:
 - Proximity:
 - defendant's relation to risk
 - reasonable reliance by victim
 - Foreseeability:
 - plaintiff's relation to risk
 - reasonable foreseeability of harm
 - Policy:
 - Whether appropriate to impose duty

STANDARD OF CARE

- ⦿ What a reasonable person would have done in the circumstances, having regard to:
 - Seriousness of potential harm
 - Likelihood of risk eventuating
 - Burden of preventative measures
- ⦿ Special characteristics or susceptibilities of plaintiff if known to defendant will influence standard of care.
- ⦿ For those *in loco parentis*, the standard of care is that care which a careful parent would take of his/her own children.

STANDARD OF CARE

- ◎ Standard of care is affected by:
 - Extent to which activity is inherently dangerous. The standard of care is higher when taking children from the familiar predictable territory of the classroom into a “foreign”, unpredictable, potentially dangerous territory.
 - The age and intellectual and physical capacity of participants, and reasonable expectations based on their past behaviours. Special characteristics or susceptibilities of plaintiff if known to defendant will influence standard of care. In the case of children, this includes adolescent characteristics such as “youthful exuberance”, impulsiveness, lack of fear and full appreciation of risk and of inhibition.

BREACH OF DUTY - NEGLIGENCE

- ⦿ Failure to exercise reasonable care or skill
- ⦿ Not negligent in failing to take precautions against a risk of harm unless:
 - Risk was foreseeable,
 - Risk was not insignificant,
 - A reasonable person would have taken those precautions, having regard to probability and likely seriousness of harm, burden of precautions and social utility of activity

BREACH OF DUTY - EQUIPMENT

- ⦿ **Defective cable:** Rusty cable supporting rope breaks, injuring child on school camp. Camp warden did not supervise installation. Only expert inspection would have detected defect. Warden held liable, school exonerated. School discharges duty if staff know premises which are apparently safe and under control of competent and careful staff (1970, NSWSC).
- ⦿ **Defective cable:** Commonwealth retained Transfield to maintain HMAS Sterling. Transfield subcontracts maintenance of high ropes course to ATS. Reservist experienced with layout and operation of course injured when safety cable snaps. Held: ATS owed duty of care to participants. Negligent in inadequate inspection (2008, NSWCA).
- ⦿ **Fall from faulty bicycle at school camp.** Student falls from bicycle supplied by recreation centre without brakes. Recreation Centre and State held liable (Qld, 1999).

BREACH OF DUTY - EXPEDITIONS

- ◎ **Fall by student on bushwalk without medical support.** Boy dies from injuries 12 hours after fall from mountain path during school expedition in adverse weather and rugged terrain without medical support and where evacuation would at some points take 18-20 hours; plaintiff girl suffers nervous shock from remaining with him during lengthy attempts at evacuation. Students were inexperienced, untrained and untoughened. Breach of duty established (1985, Vic).
- ◎ **Mountain death by hypothermia.** Schoolboy dies of hypothermia during hike around Cradle Mountain in foreseeably dangerous circumstances. Lack of adequate prior inspection by leaders of equipment and clothing; inappropriate equipment (1973, Tas).

BREACH OF DUTY - VARIOUS

- ⦿ **Incineration of student in tent at school camp.** Teacher negligent in placing gas lantern adjacent to tent.
- ⦿ **Trail ride for young child.** Negligent to take 5yo child without previous experience on trail ride, on placid old horse, without being led.
- ⦿ **Accident while using water slide at scout park:** Boy using water slide at scout park slips and falls, damaging teeth. Possibility of slip foreseeable. Supervision adequate, slide not dangerous. Unfortunate accident not attributable to fault of teachers or park operator (1999, NSWCA).

CAUSATION OF HARM

- ⦿ Negligence was a necessary condition (“but for” test)
- ⦿ Appropriate for scope of liability to extend to harm (policy)

CIVIL LIABILITY

**CIVIL LIABILITY ACT AND
RECREATIONAL RISK**

RECREATIONAL RISK

- “People who pursue recreational activities regarded as sports often do so in hazardous circumstances; the element of danger may add to the enjoyment of the activity. Accepting risk, sometimes to a high degree, is part of many sports. A great deal of public and private effort, and funding, is devoted to providing facilities for people to engage in individual or team sport. This reflects a view, not merely of the importance of individual autonomy, but also of the public benefit of sport. Sporting activities of a kind that sometimes result in physical injury are not only permitted; they are encouraged” Gleeson CJ, *Agar v Hyde*

INHERENT RISKS

- ⦿ No liability for harm resulting from materialisation of inherent risk
- ⦿ ***Inherent risk is*** risk of occurrence that cannot be avoided by exercise of reasonable skill and care – inevitable accident
- ⦿ However, does not exclude liability for failure to warn of a risk

OBVIOUS RISKS

- ⊙ No duty of care to warn of obvious risk, unless
 - Advice or information requested
 - Specific statutory requirement
- ⊙ ***Obvious risk*** is one obvious to a reasonable person in position of plaintiff, including risks that are patent or a matter of common knowledge, even though low probability of occurrence, and not prominent, conspicuous or physically observable.
 - Risk of injury from diving into water of unknown depth is obvious

RECREATIONAL ACTIVITIES

- ⦿ *Recreational activity* includes any sport, any pursuit or activity engaged in for enjoyment, relaxation or leisure, or at a place (beach, park, public open space) where people engage in sport etc.
- ⦿ *Dangerous recreational activity* is one that involves a **significant risk of physical harm**
 - More than trivial, less than likely
 - Seriousness of potential harm as well as likelihood is relevant - not satisfied by significant risk of insignificant harm eg sprained ankle or scratch

WHAT IS DANGEROUS?

- ⦿ Judged by the particular activities engaged in by the plaintiff at the relevant time
- ⦿ Dangerous:
 - Spotlight shooting
 - Diving from bollard on jetty into water of unknown depth
- ⦿ Not dangerous:
 - Dolphin watching cruise
 - Trail ride on a horse
 - Spearfishing in company in a familiar area not known to be frequented by sharks

OBVIOUS RISKS OF DANGEROUS RECREATIONAL ACTIVITIES

- ⦿ There is *no liability* for harm suffered as a result of materialisation of an *obvious risk of a dangerous recreational activity* engaged in by plaintiff, whether or not aware of the risk
- ⦿ Intended to exclude liability for obvious risks of particularly dangerous sports and other risky activities

RISK WARNINGS

- ⦿ *No duty of care* is owed to a person who engages in a recreational activity, in respect of a risk, if the risk was the subject of a risk warning
 - Companion or parent of incapable person
 - Given in manner reasonably likely to result in people being warned of risk beforehand
 - Orally or in writing or by sign
 - Can be general so long as warns of general nature of particular risk
 - Must not be contradicted

RISK WAIVERS

- ⦿ A contract for supply of recreational services may exclude, restrict or modify civil liability for failure to render services with reasonable care or skill
- ⦿ A term to the effect that a person engages in a recreational activity at his or her own risk operates to exclude liability for failure to render services with reasonable care and skill
- ⦿ But not if harm results from contravention of a law that establishes specific practices or procedures for protection of personal safety
- ⦿ The term must be clear and unambiguous, and not contradicted. Doubts and ambiguities will be resolved in favour of plaintiff

STATUTORY RESPONSIBILITY
OCCUPATIONAL HEALTH
AND SAFETY

OCCUPATIONAL HEALTH & SAFETY

- ⦿ An employer must ensure the health, safety and welfare at work of all the employees of the employer.
- ⦿ An employer must ensure that people (other than the employees of the employer) are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work.
- ⦿ A person who has control of premises used by people as a place of work must ensure that the premises are safe and without risks to health.
 - **Place of work** means premises where persons work.
 - **Premises** includes any place, and in particular any land, building or part of any building, or any vehicle, vessel or aircraft, or any installation on land, on the bed of any waters or floating on any waters, or any tent or movable structure
 - **Work** means work as an employee or as a self-employed person

SAFETY IN OUTDOOR ACTIVITIES
RISKS AND PRECAUTIONS

RISKS IN OUTDOOR ACTIVITIES

- ⦿ Systems and procedures
- ⦿ Supervision
- ⦿ Equipment
- ⦿ Exposure

PRECAUTIONS

- ⦿ **Systems and procedures.**
 - Documented SOPs.
 - Adhere to them.
 - Maintain a document trail
- ⦿ **Meticulous prior planning, including:**
 - Prior detailed reconnaissance
 - Triggers and plans for emergency evacuation
 - External communications with emergency services
 - Dates, times and progressive stage-points should be communicated to external agencies, and a “check-in” reporting system established with deadline times.
- ⦿ **Qualified staff in appropriate ratios, including sufficient para-professional and other assistance to permit supervision of small groups.**

PRECAUTIONS

- ⦿ Leaders must:
 - have prior advanced navigation skills.
 - be very familiar with and knowledgeable about treatment for heat illness and hypothermia.
- ⦿ **Equipment checks.**
 - Basic minimum standards of protective clothing must be promulgated well in advance.
 - Equipment and clothing must be carefully checked before departure.
 - Packs should be weighed.
 - Inadequately equipped personnel should not be taken.
- ⦿ **A detailed prior safety briefing is essential.**
- ⦿ **Monitor and respond to changed conditions:**
 - Up-to-date weather information must be obtained before and during the activity.
 - There must be a “safety-first” attitude of turning back if the situation seriously deteriorates.

DEALING WITH THE FALLOUT

INSURANCE &

INCIDENT MANAGEMENT

INSURANCE

- ⦿ Public liability
- ⦿ Product liability
- ⦿ Professional indemnity - advice
- ⦿ Exclusions – advice, dangerous activities
- ⦿ Broker
- ⦿ Reputable insurer
- ⦿ Duty of utmost good faith
- ⦿ Duty of disclosure

INCIDENT MANAGEMENT

- ① Deal with incident
- ① Document
- ① Preserve evidence
- ① Notify insurer
- ① Investigations
- ① Coronial inquests
- ① Civil claims

CONCLUSION

CONCLUSION

- ⦿ Use risk warnings.
 - Must cover all risks, be comprehensible and not contradicted.
- ⦿ Use risk waivers.
 - Engage in activity at own risk.
- ⦿ Maintain a document trail
- ⦿ Insure with a reputable insurer
 - Make sure the policy covers your risks
- ⦿ Our society accepts that certain recreational activities may be provided, even for young children, and even encouraged, albeit that they involve risks of serious injury. We accept some risk associated with healthy recreation and education
- ⦿ Meticulous planning and thorough training is essential