DISTRICT COURT OF QUEENSLAND

CITATION:	*Smith v State of Queensland* [2023] QDC 101
PARTIES:	PAUL JOHN SMITH (plaintiff) v STATE OF QUEENSLAND (defendant)
FILE NO:	101/23
DIVISION:	Civil
PROCEEDING:	Claim
DELIVERED ON:	3 March 2023
DELIVERED AT:	Brisbane
JUDGE:	Conner DJC
ORDER:	Judgment for the plaintiff against the defendant in the sum of $560,000.00
CATCHWORDS:	NEGLIGENCE – DUTY OF CARE - OBVIOUS RISK – BREACH OF DUTY *Roads and Traffic Authority of New South Wales v Dederer and Another* (2007) 238 ALR 761 *State of Queensland v Kelly* [2014] QCA 27 (25 February 2014) *Civil Liability Act* 2003

Judgment of His Honour, Conner DCJ:

Introduction

The plaintiff in this matter, Mr Paul Smith, was seriously injured on 5 January 2021 when he suffered compound fractures of both legs. He was 19 years of age. He had been standing at the top of a natural rocky ledge that was approximately 10 metres above a popular swimming hole known as the 'Blue Pool' and situated at Flagstone Creek near Toowoomba in the Blue Pool National Park. He was taking photographs of others who were jumping from the ledge into the water below. The plaintiff lost his footing and slipped off the ledge and landed not in the water but on rocks at water level and as a result suffered his injuries. Mr Smith claims that the defendant is liable to him for his injuries and has sued for damages for negligence. Quantum of damages has been agreed at $700,000.

The defendant has conceded that it had the care, control and management of the land at Flagstone Creek where the blue pool is located and that it owed a duty of care to lawful entrants

on that land, including the plaintiff. However, the defendant denies that it is liable in negligence to the plaintiff by operation of the relevant provisions of the *Civil Liability Act* 2003 ("CLA") and also that it did not breach its duty of care to the plaintiff. In particular, the defendant has pleaded that it is protected by operation of Section 19 of the CLA which provides: "(1) A person 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 person suffering harm. (2) This section applies whether or not the person suffering harm was aware of the risk."

Section 18 is relevant as it provides a definition of what constitutes a dangerous recreational activity. It provides: "… dangerous recreational activity means an activity engaged in for enjoyment, relaxation or leisure that involves a significant degree of risk of physical harm to a person."

Section 13 is also relevant as it provides the definition of what constitutes an "obvious risk":
"Meaning of *obvious risk*
(1) For 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…"

Section 15 of the CLA is also relevant. It provides: "(1) A person (defendant) does not owe a duty to another person (plaintiff) to warn of an obvious risk to the plaintiff." Hence, if the defendant can successfully argue that the risk to the plaintiff was an obvious risk, the defendant is under no duty of care to warn the plaintiff of that risk. Such a result would be likely to allow the defendant to escape liability in this matter as the plaintiff's case is largely grounded in the claim that the defendant did not warn him of the risk that resulted in his injuries.

Causation is not at issue in these proceedings. The defendant has not challenged the plaintiff's contention that if a breach of duty can be proven, the injuries were a foreseeable consequence of that breach of duty.

Therefore, the issues for determination are:
(a) Was the relevant risk "obvious" within the meaning of s 13 of the *Civil Liability Act* 2003? If so, there was no duty to warn of the risk.
(b) Was the plaintiff engaged in a "dangerous recreational activity" within the meaning of s 19 of the *CLA* at the time he was injured? If so, the defendant cannot be liable.
(c) Did the defendant breach any duty of care owed to the plaintiff? The plaintiff contends that the defendant was in breach of its duty of care to him by failing to do one or more of the following:

1. Have a warning sign that clearly warned about the danger of standing on the rocky ledge and not just of the danger of jumping or diving into the pool;
2. Fence off the area that gave access to the rocky ledge;
3. Enforce the prohibition on jumping and diving into the pool by having a park ranger stationed at the pool during opening hours.

Background

Before turning to those issues I need to say a little of the background facts. At the relevant time the plaintiff was aged 19 and a tourist. He had travelled out from Ireland to Australia in December 2020 on a tourist visa. He was travelling alone. He had worked as a freelance photographer since completing a diploma in photography some 12 months earlier. At the time he slipped and fell the plaintiff has confirmed that he was taking photographs which he intended to attempt to sell to certain media outlets.

The principal focus of the plaintiff's case was on the need for more and better warnings. The plaintiff claims that there was not sufficient warning of the risk of standing on the rocky ledge, the risk of falling from that ledge and the risk of injury that is likely from any such fall.

The evidence shows that the reason the plaintiff slipped was that the ledge where he was standing had become wet which had made it slippery. The evidence, which I have accepted as accurate, has made it clear that the plaintiff had been standing on the ledge for around 45 minutes taking photographs. It is also clear that the ledge was not wet until shortly before he fell. People jumping into the water had been taking another route to get to the jumping point on the ledge and had not been walking in the area where the plaintiff was standing. However, immediately before the plaintiff fell a person who been jumping into the water had gone to talk to the plaintiff and it appears that this jumper was wet from being in the pool and this was the cause of the ledge becoming wet at the place where the plaintiff was standing.

It is not in dispute that there are no warning signs that warn of the risk of standing on the ledge. There *is* a sign warning of the dangers of jumping or diving into the pool, but the plaintiff was not engaged in that activity at the time that he fell.

There is no history of serious injuries at the location. The area had only been open to the public for a period of 12 months before the plaintiff was injured and perhaps this explains why there is no such record, even though it appears that jumping into the pool is a popular pastime. Another reason is likely to be that the track that leads to the rocky ledge is well formed and safe to climb. It is a path that continues on to another part of the park and is maintained by the park authorities. Those wanting to access the rocky ledge only have to take a slight deviation from the path to get to the ledge. Even this deviation is quite safe and well formed. The evidence shows that those who like to jump from the ledge have constructed a makeshift path to that place by clearing rocks and debris and placing other flat rocks so that these can be used for easier access. The park authorities have disassembled the makeshift path on various occasions over the last few years. However, it has been reconstructed each time. The last time it was disassembled was 3 months before the incident in question. To access the makeshift path requires stepping over an obvious single chain barrier, although this barrier is only around 60 cm high and there is no sign on the chain barrier warning visitors not to cross it. The chain barrier consists of a single length of chain, strung between a series of metal posts along the side of the official path, forming an obvious but easily crossed fence along the side of the path. This chain fence is only used in places where the authorities want to keep visitors on the path, such as this place where crossing the chain will expose visitors to some danger.

It is well known to the park authorities that many people engage in the activity of jumping off the ledge into the pool. On the day the plaintiff was injured around 10 people were present at the pool and around half of those were jumping off the ledge, many multiple times. The Head Ranger said in evidence that she is well aware that jumping is popular, but that she felt that the warning sign prohibiting the activity was prominent and that she and other staff regularly patrol

the area to stop jumpers and to eject them from the park. She also said that the only option for preventing jumping would be to prevent access to the pool and that she did not think that would be fair on the many people who simply want to visit or swim in the pool. She said that building a fence or barrier that would prevent people from accessing the area was not a viable option as it would be very expensive and would detract from the natural beauty. The defendant tendered documentary evidence which showed that an engineer had been engaged in 2015 to design such a barrier and had concluded that the cost at that date would have been around $1,760,000.00. The relevant State Minister had considered the proposal and had rejected it on advice from the Department of Natural Resources which concluded that the cost was too high and also that the visual impact was unacceptable and in breach of the relevant construction guidelines for National Parks.

The sign prohibiting jumping is impossible to miss, being located in a prominent position at the pool itself. The sign states that swimming is allowed but that 'jumping and diving is prohibited and may lead to death or serious injury" and "there may be hidden obstacles in or below the water" and also "for their own safety visitors must not deviate off the pathways provided for access". The sign also states that "there are dangers in swimming in this pool as there are no lifeguards on duty".

Was the relevant risk an "obvious risk"?

The defendant submitted that it did all that was reasonable and that its warning signs were adequate. It also contends that the risk here to the plaintiff was "obvious" within the meaning of s 13 of the *CLA* and so no duty to warn arose. Further, it argued that the plaintiff was engaged in a dangerous recreational activity within the meaning of s 19 of the *CLA* and hence no duty at all was owed. If the defendant is right in these submissions then there is no need to go on and consider the content of the duty of care owed and whether it was breached.

As the Queensland Court of Appeal confirmed in *State of Queensland v Kelly* [2014] QCA 27, in deciding if a risk is an obvious risk the question for determination is whether the plaintiff's conduct involved a risk of harm which would have been obvious to a reasonable person in the plaintiff's position. All relevant circumstances are to be brought into account and the test is an objective one.

The ledge on which the plaintiff was standing measures approximately two metres square. It is quite smooth and slopes gently, almost imperceptibly downwards towards the edge above the pool from which people jump and from which the plaintiff fell. The evidence shows that immediately before he fell the plaintiff was standing at the point that was the furthest away from the edge. He apparently slipped only slightly but that was enough to make him stumble towards the edge, go over and land on the rocks below. It appears that jumpers must propel themselves out from the edge when they jump to avoid the rocks on which the plaintiff landed.

I have concluded that the risk was not an obvious risk within the meaning of s 13. In my opinion, the risk here was not apparent to or would be recognised by a reasonable man in the position of the plaintiff exercising ordinary perception, intelligence and judgment. The evidence shows that the plaintiff had been careful about his safety and had not ventured close to the edge of the ledge before he slipped and fell. Also, the plaintiff had chosen to stand in an area away from where jumpers were making the ledge wet and I am satisfied that it was the sudden wetness of the area caused by the jumper who spoke to the plaintiff that took the plaintiff by surprise and caused his fall.

I have also taken into consideration the warning sign which warned visitors not to "deviate off the pathways provided for access". The plaintiff has conceded that he realised he was deviating

off the pathway provided by the park authorities. However, I am not satisfied that the risk that accrued to the plaintiff was an obvious consequence of failing to abide by that warning.

Was the plaintiff engaged in a "dangerous recreational activity"?

The defendant has pleaded that the plaintiff was engaged in a dangerous recreational activity at the time he sustained his injuries. At the time he fell the plaintiff was engaged in the activity of photography. He is a professional photographer and argued that he was not engaged in, to cite the relevant parts of s 18 of the CLA, "an activity engaged in for enjoyment, relaxation or leisure". Photography is a leisure activity for many people, but the test here is an objective one and I am satisfied that the plaintiff was not engaged in leisure despite being on holidays and travelling on a tourist visa.

Nor was it an activity that "involves a significant degree of risk of physical harm to a person". There was some danger caused by the location being used by the plaintiff, being on a rocky ledge some 10 metres above the water and rocks below, however I am not satisfied that there was a significant risk of physical harm.

For these reasons I find that the defendant cannot rely on s 15 or s 19 of the *CLA* to escape liability.

Did the defendant breach its duty of care?

Sections 9 and 10 of the *CLA* are relevant. They provide:

9 General principles

(1) A person does not breach a duty 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 reasonably to have known); and

(b) the risk was not insignificant; and

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

(2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among 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.

What is in issue is what response could reasonably be expected from the State in all the circumstances. The defendant argued that the provision of the warning sign was an adequate precaution to the risk posed to persons visiting the pool. It said that if Mr Smith had not deviated from the path then he would not have been injured. However, I am not satisfied that the response was sufficient. I find that the signs should have made it clear that climbing onto the rocky ledge, or indeed any climbing above the pool area also involves a serious risk of injury and would have been a more complete and sensible response in the circumstances.

The defendant also argued that other precautions including fencing and proper supervision by a ranger were required. I do not agree that these extra precautions are required. I find that a better sign would suffice to meet the required standard of care.

In the High Court decision in *Roads and Traffic Authority of New South Wales v Dederer and Another*[1] ('*Dederer*') it was decided, by a 3-2 decision, that the Roads and Traffic Authority ("RTA") did not breach its duty of care to a teenager who became a partial paraplegic by diving off a bridge. In that case there was a warning sign that warned of the exact activity that led to the injury, i.e. diving.

The court held that a duty of care imposes an obligation to exercise reasonable care, not a duty to prevent potentially harmful conduct[2]. The extent of the obligation owed by the RTA is that of a road authority exercising reasonable care to see that the road is safe for users exercising reasonable care for their own safety[3]. The Court held that the risk arose not from the state of the bridge but from the risk of jumping into shallow water and shifting sands, which were not under the RTA's control[4]. The magnitude of the risk and the probability of injury had to be balanced against the expense, difficulty and inconvenience of any alleviating action. Precautions suggested by the plaintiff which may have prevented the injury included new fencing and a different design for the handrail, but the court decided that these steps would not necessarily stop people jumping from bridges. The Court held that the existing "no diving" signs were a reasonable response to the risk and the RTA did not breach its duty of care[5].

Applying the decision in *Dederer* to the present facts, it is clear that the warning sign was inadequate and that there should have been a more comprehensive warning provided, one that included the fairly obvious danger of standing on the rocky ledge or similar positions next to high and dangerous drops.

I find that the duty of care owed by the park authority included a duty for more comprehensive warnings and a better sign could have achieved this. I find that there was a breach of duty on the part of the park authority and hence the State on the basis that:

1. The risk of people climbing to the area where the plaintiff was standing was a foreseeable risk;
2. The risk was significant. Despite the fact that there have been no recorded serious injuries at this location it was only a matter of time until there was, as the injuries to the plaintiff display;
3. A reasonable person in the position of the park authority would have provided the extra warnings;
4. The probability of harm was high;
5. Likely seriousness of harm was severe;
6. The burden of including the extra information was low;
7. There is no social utility in activity of climbing onto the ledge.

Conclusion

For the reasons outlined above, I find the defendant liable to the plaintiff for his injuries. I note that the defendant did not make any submissions in response to the plaintiff's submission that any allocation for contributory negligence should be limited to a maximum of 20%. As I am satisfied that an allocation of 20% is appropriate, there is no need to discuss the issue of contributory negligence further. I will order that the plaintiff succeed and the judgement amount is reduced by 20% in respect of an allocation for contributory negligence.

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[1] *Roads and Traffic Authority of New South Wales v Dederer and Another* (2007) 238 ALR 761.
[2] Ibid 767 [18] (Gummow J).
[3] *Roads and Traffic Authority of New South Wales v Dederer and Another* (2007) 238 ALR 761, 774 [47] (Gummow J).
[4] Ibid 778 [60].
[5] Ibid 782 [79].

Order

Judgment for the plaintiff against the defendant in the sum of $560,000.00 (being 80% of the $700,000.00) plus costs for the plaintiff on the standard basis.