SUPREME COURT OF QUEENSLAND

CITATION:	*State of Queensland v Kelly* [2014] QCA 27
PARTIES:	**STATE OF QUEENSLAND** (appellant) **v** **EVAN JOSEPH KELLY** (respondent)
FILE NO/S:	Appeal No 4753 of 2013 SC No 8050 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	17 September 2013
JUDGES:	Fraser JA and Philippides and Henry JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – GENERALLY – where the respondent suffered injuries when he ran down a sand dune and fell into Lake Wabby on Fraser Island – where the respondent was shown an orientation video about Fraser Island by his tour company – where serious injuries had occurred at the lake in the past – where the respondent passed two signs warning of dangers associated with the lake and sand dunes – where the trial judge found the appellant negligent – where the appellant argued the risk of injury was an "obvious risk" within the meaning of s 13 of the *Civil Liability Act* 2003 (Qld) – whether the risk of serious injury which materialised was an "obvious risk"– whether and in what way the warning signs should be considered in determining whether the risk was an obvious risk TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – GENERALLY – where the respondent was an Irish tourist – where the respondent failed to study the warning signs closely – where the respondent had previously and repeatedly engaged in the activity without injury – whether the trial judge erred by making an insufficient reduction of damages to account for contributory negligence

Civil Liability Act 2003 (Qld), s 13, s 14, s 15(1), s 19(1), s 23

Brodie v Singleton Shire Council (2001) 206 CLR 512; [2001] HCA 29, cited
Chotiputhsilpa v Waterhouse [2005] NSWCA 295, distinguished
Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380, cited
Council of the City of Greater Taree v Wells (2010) 174 LGERA 208; [2010] NSWCA 147, cited
Glad Retail Cleaning Pty Ltd v Alvarenga [2013] NSWCA 482, cited
Great Lakes Shire Council v Dederer & Anor; Roads & Traffic Authority of New South Wales v Dederer & Anor [2006] NSWCA 101, cited
Jaber v Rockdale City Council [2008] NSWCA 98, considered
Podrebersek v Australian Iron & Steel Pty Ltd (1985) 59 ALJR 492; [1985] HCA 34, cited
Wyong Shire Council v Vairy [2004] NSWCA 247, cited

COUNSEL: G W Diehm QC, with K Philipson, for the appellant
R Douglas QC, with G O'Driscoll, for the respondent

SOLICITORS: Crown Law for the appellant
MurphySchmidt Solicitors for the respondent

[1] **FRASER JA:** The respondent was rendered a partial tetraplegic by injuries he suffered when he ran down a sand dune and fell into Lake Wabby on Fraser Island in September 2007. He sued the appellant for damages for negligence. The appellant conceded that it had the care, control and management of the public land on Fraser Island and owed a duty of care to lawful entrants on that land, including the respondent. There were disputes about the content of the duty and other matters.

[2] After a three day trial upon the issue of liability only, the trial judge held that:

(a) The content of the appellant's duty of care was to take reasonable care to protect lawful entrants from risk of physical harm.

(b) The respondent's injuries were caused by the appellant's breach of its duty of care in failing to provide adequate warning of the dangers inherent in the visit to Lake Wabby in a video which was shown to the respondent and others who were brought to Fraser Island by a commercial operator.

(c) The damages recoverable by the respondent for the appellant's negligence should be reduced by 15 per cent because the respondent was guilty of contributory negligence in failing to closely read and obey signs which warned against running down dunes at Lake Wabby.

[3] The trial judge therefore gave judgment for the respondent against the appellant for 85 per cent of the respondent's damages to be assessed.

[4] The appellant has appealed against that judgment on the following grounds:

> "1. His Honour erred in finding that the risk of serious injury inherent in the activity that the Plaintiff was engaging in at the time he sustained his injury was not an 'obvious risk' within the meaning of s 13 of the *Civil Liability Act* 2003.

2. His Honour ought to have found that the risk involved in the said activity was 'an obvious risk'.

3. His Honour erred by finding that the two 'danger' signs erected on or about the walking track into Lake Wabby were not effective communications of the risk inherent in the said activity.

4. In the premises, his Honour ought to have found:

   (a) the Appellant did not by operation of s 15 of the *Civil Liability Act* 2003 owe a duty to the Plaintiff to warn of the risk by inclusion of further information in the video viewed by the Plaintiff on or about the 25th of September 2007; and/or

   (b) the activity being engaged in by the Plaintiff was a 'dangerous recreational activity' within the meaning of ss 18 and 19 of the *Civil Liability Act* 2003; and

   (c) by s 19(1) of the *Civil Liability Act* 2003, the Appellant was not liable in negligence for harm suffered by the Plaintiff as a result of the materialisation of an obvious risk, being the said risk inherent in the activity engaged in by the Plaintiff.

5. Alternatively, his Honour erred by reducing the damages for contributory negligence by 15% in that his Honour ought to have, in the premises, assessed the contributory negligence at 65%."

[5] As the appeal was argued, ground 3, like grounds 1 and 2, related to the question whether the risk of serious injury which materialised was an "obvious risk". Section 13 of the *Civil Liability Act* 2003 (Qld) provides:

> "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.
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> (2) Obvious risks include risks that are patent or a matter of common knowledge.
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> (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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> (5) To remove any doubt, it is declared that a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless the failure itself is an obvious risk.
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> *Examples for subsection (5)—*

1 A motorised go-cart that appears to be in good condition may create a risk to a user of the go-cart that is not an obvious risk if its frame has been damaged or cracked in a way that is not obvious.

2 A bungee cord that appears to be in good condition may create a risk to a user of the bungee cord that is not an obvious risk if it is used after the time the manufacturer of the bungee cord recommends its replacement or it is used in circumstances contrary to the manufacturer's recommendation."

[6] Section 15(1) provides that "[a] person (***defendant***) does not owe a duty to another person (***plaintiff***) to warn of an obvious risk to the plaintiff" and s 19(1) provides that "[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." The respondent succeeded in his claim only upon the ground that the appellant failed to warn him of the risk of injury which materialised. Accordingly, if this risk was an "obvious risk" then the appellant must succeed in the appeal by virtue of s 15. On the other hand, if the risk was not an "obvious risk", neither s 15 nor s 19 is applicable.

[7] It follows that the ultimate issues in the appeal are:

(a) Did the trial judge err in finding that the risk of injury which materialised was not an "obvious risk" within the meaning of s 13 of the *Civil Liability Act* 2003 (Qld)?

(b) Alternatively, did the trial judge err by making an insufficient reduction of the damages on account of the respondent's contributory negligence?

Facts

[8] The following facts found by the trial judge are not in issue.

[9] The respondent was a 22 year old Irish tourist in Australia on a three month holiday which had commenced in July 2007. He had completed an apprenticeship as an electrician and worked as a tradesman for two to three years. In Ireland he had exposure to waterways and the ocean. He had not been exposed to sand dunes until he came to Australia. He visited Fraser Island after seeing advertisements at a hostel where he was staying with two friends. The owners of the hostel were licensed as commercial operators to bring tourists onto Fraser Island in four wheel drive vehicles. It was a condition of the licence that they ensure the persons coming to the island watch a video prepared by the appellant (by the Queensland National Parks and Wildlife Service). The respondent and his friends watched that video. The video showed some rules applicable on the island and some dangers the island presented to visitors. The video gave a number to individual points. At point 24, which was well into the video, there were warnings about entering shallow lakes and streams which occupied some seven seconds. The video showed an extremely shallow stream with an obvious bed and grassy reeds protruding the water's surface. No reference was made to Lake Wabby, to steep sand dunes, or to the dangers of running down steep sand dunes.

[10] The day after the video was shown to the respondent and his friends they were driven by the licensed commercial operators to Fraser Island. On the following day they

were driven to the southern entrance to Lake Wabby, arriving at about 3.00 pm. They then walked for about 2.5 km, on a hot day, along that "tough old track through the wood"[1] to the lake. The lake presented as an attractive enticement to hot walkers. The respondent and his friends were hot and keen to get to it as quickly as they could.

[11] Since at least 1999 this sign was present at the commencement of the track and at the entrance to the lake:

The top pictogram depicts what appears to be a man diving, perhaps into shallow water, and hitting his head on a peak of a jagged surface. The lower pictogram depicts what appears to be a man diving into water.

[12] The trial judge found that the respondent had a vague recollection of a sign on the path to the lake but that he was unclear about its location and content and he did not recall any warning or prohibition upon people running down the dunes or running into the water. Neither of the respondent's friends had any recollection of any sign.

[13] There were numerous other persons present at the lake, some swimming, some sunbathing, and quite a number of them running up and down the sand dunes. The respondent thought that there were about 30 people doing that at one stage. His friend Mr Heafey thought there were 50 to 60 on the dunes of the 100 people present at the lake. The respondent's friend Mr Alan Kelly thought there were some 50 people present and about 10 or 15 running down the dunes. He spoke of tour buses and day tours in groups of 10 or 15 people in each group. These people were walking up the steep sand dune and running back down it and into the water. Mr Alan Kelly saw a few people diving but the respondent and Mr Heafey did not see any diving. The respondent did not relate the activity he saw to any of the warnings in the video which he had seen two days earlier.

[14] The respondent had read advertisements which described Lake Wabby as the deepest lake on the island. His visual assessment was that it looked very deep given its colour, and he understood that it was very deep. The respondent and his friends first had a swim and then repeatedly ran up and down the dunes, falling or jumping into

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1 [2013] QSC 106 at [8].

the water, in the area in which they had observed other people engaging in that activity. The respondent discovered that the water became very deep very quickly after he ran into it. Neither the respondent nor either of his friends was conscious that this involved any danger. It was fun. The trial judge accepted evidence given by the respondent, his friends, and his father, that the respondent was not a risk taker and he was not inclined to ignore safety messages. He had complied with safety warnings and directions at various locations during his trip along the eastern coast in Australia, and his friends behaved in a similar way. The respondent had not seen anyone get into any difficulty in running down the dune and into the water. Neither he nor any member of his group got into such difficulties when they were running down the dune. The respondent repeated this activity about 10 times.

[15] There was a substantial contest at the trial about the mechanism by which the respondent fell and was injured when he ran down the sand hill for the last time. The trial judge accepted the following account given by the respondent:

> "Now, on the last run where you had your injury, can you recollect and tell the Court what you did?-- I just ran down and with the steepness of it you kind of - I just - I was gathering up speed and I kind of lost - you know, you kind of can't control your legs, you've got momentum and I kind of just went when I got nearer the edge then head first. I kind of didn't get to run into the water. I just kind of fell before I got into the water.
>
> Do you know the reason why you fell? What happened with your feet?-- I just kind of slipped in the - you know, with the sand and with the momentum, you kind of, just kind of loose sand, and then I just went over.
>
> Had you been doing anything on that last run differently to what you had been doing on the runs before?-- No. No.
>
> Were you doing anything differently than what you observed the others that were running up and down the sand dune?-- No.
>
> Do you know how far away from the water's edge it was that you lost your footing?-- Maybe a metre, maybe something, kind of - I know I was close to the edge, close enough to the edge, within a metre maybe."[2]

[16] The trial judge found that "the [respondent] was running down a steep sand dune towards the bottom of which he lost his footing, probably because the sand gave way or shifted underneath him, causing him to inadvertently plunge into the water too close to the edge and so suffered injury…it was the sudden giving way of the sand, or the losing of the footing in the sand, that converted what was intended to be a jump into the water in perfect safety into an inadvertent head first plunge into the water with the potential for catastrophic results."[3]

[17] There was a long history of serious injury to visitors at Lake Wabby. The incidents were summarised in exhibit 11, although it was not known whether that was a complete record and it was not certain that the cause of each injury had been recorded accurately. In the 17 year period before the respondent was injured

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2 [2013] QSC 106 at [19].

3 [2013] QSC 106 at [33]-[34].

18 incidents were recorded, many of which involved serious spinal injuries. Thirteen involved the back, neck or spine and others included references to injuries to feet, leg and shoulders. Many of the incidents refer to diving into the water or the shallow water of the lake. Some of the entries refer to the incident occurring when the injured person ran or walked down the Lake Wabby sand dune.

[18] On 20 April 1993 the appellant's "Manager (Great Sandy)" wrote a memorandum to the "Manager (Park Management)" expressing concern about a report of "yet another accident at Lake Wabby", referring to advice by staff that at least two people had broken their necks at the lake in the previous two years and had become quadriplegic and that earlier in 1993 another person had seriously injured his spinal cord, and recorded that:

> "It appears that visitors injured generally read the warning signs at the lake but ignore the dangers. This area is clearly one of the most dangerous areas on park estate in Queensland by virtue of the number and seriousness of accidents there."

The manager thought that the lake "requires urgent evaluation and formulation of an action plan" and that the factors requiring consideration included adequacy of the existing signage and of other visitor information and of the desirability or need for fencing or other physical barriers to prevent visitors running down a dune.

[19] In 2002 an assessment entitled "Risk Assessment on Diving Injuries at Lake Wabby" was carried out. The trial judge questioned whether the real risk of injury at the lake was from diving:

> "Generally speaking, one can understand persons suffering injury from diving into waters of unknown depth. But it is difficult to believe that the waters of Lake Wabby fall into this category. Here it seems very evident where the shallows of the lake are located. They are only to be found in the area immediately adjacent to the water's edge. The water deepens suddenly from there. That circumstance at least raises the question of why it is that visitors are entering the water head first close in to the edge. The [respondent's] facts might supply the answer."[4]

[20] The trial judge referred to the evidence about the numbers of persons running into the lake on the day of the respondent's accident and to a photograph of someone rolling down a sand blow into the lake in the 2002 assessment and found that it seemed almost certain that visitors ran or rolled down the steep dunes into the water as an everyday event, and the respondent was not the first to find himself in difficulty as a result (as seemed clear from exhibit 11). It was unsurprising that the 2002 assessment concluded, as it did, that the risk of injury was "high" notwithstanding that "considerable effort and strategies were in place" (including the two warning signs) to control the level of risk.[5] The 2002 assessment recommended a review of "the possibility of amending conditions of commercial operators to highlight the danger of persons diving into Lake Wabby (including an induction style orientation of Lake Wabby)"; that recommendation was not acted upon.[6] The trial judge found that the manager's opinions expressed in 1993 were accurate and applied with equal force when the plaintiff was injured in September 2007.

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4 [2013] QSC 106 at [45].
5 [2013] QSC 106 at [47].
6 [2013] QSC 106 at [47]-[48].

[21] Nowhere else on Fraser Island had anything like this record of injury. So far as the evidence showed, no other lake on Fraser Island had an incident of serious injury caused by the method by which visitors entered the waters of the lake.[7] That finding was informed by the cross-examination of Mr Belcher, the Fraser Coast Area Manager for Queensland Parks and Wildlife Services. To his knowledge there had not been any paraplegic or quadriplegic injuries occasioned within the last 10 years in any of the other lakes on the island or, within the last five years, at Indian Head (a headland on the ocean beach).[8] The video shown to the respondent had been altered to encompass perceived risk of injury at Indian Head.

[22] Fraser Island is an extremely popular tourist destination, being visited by about 356,000 people in May 2008. Fifty-five per cent (189,000 of the estimated number of those visitors) were on commercial tours, predominantly day tours. Visitor numbers had increased dramatically over the decades, being estimated at 220,000 in 1993 and 314,000 by 1999-2000. A significant number of the visitors visited Lake Wabby; in May 2008 it was estimated that about 109,400 people visited the lake, the peak daily use was 600, the maximum number of visitors to the lake at any one time was about 210, and the maximum group size was 52. The video seen by the respondent and his friends was required to be shown to all visitors who came to the island through licensed commercial operators, so that about 55 per cent of all visitors to the island were exposed to the video.

The trial judge's conclusions

[23] After holding that, measured against the likelihood and magnitude of risk of injury, the activity in which the respondent was engaged when he was injured did not involve "obvious risk" of injury within the meaning of that term as it was defined in s 13 of the Act, the trial judge applied the principles relating to breach of a duty to take care in ss 9 and 10 of the Act and held that:

(a) there was no breach of duty by the appellant in the positioning of the signs, but the signs were not adequate to convey the real danger at Lake Wabby (not only diving, but running down the steep dunes to the water);

(b) the appellant breached its duty of care by:

(i) "failing to provide adequate warning of the dangers inherent in a visit to Lake Wabby by appropriate adaptation of the video, mentioning not only diving but running down the steep dunes with express reference to the long list of catastrophic and serious injuries sustained there over the preceding years"; and

(ii) "by failing to ensure that the signs leading into the lake more definitively identified the dangers by reference to the numbers of catastrophic injuries suffered and by the provision of a message that emphasised that the risks were not merely in diving into shallow water but in the running down the dunes".[9]

[24] The trial judge applied the principles concerning causation in s 11 of the Act and found that:

(a) The respondent failed to satisfy the onus upon him of proving that, if the signs had been suitably adapted to avoid the appellant being in breach of its duty of care, the respondent would have seen the signs

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7 [2013] QSC 106 at [51].

8 [2013] QSC 106 at [94].

9 [2013] QSC 106 at [142]-[145].

and they would have been effective in deterring his conduct. "Factual causation" in respect of the signs was therefore not shown, with the result that the respondent failed to prove that his injuries were caused by the appellant's breach of duty relating to the signs.

(b) The respondent paid attention to the video when it was shown to them and, had the video contained the appropriate adaptations, the respondent would have seen, appreciated and heeded a warning against running down the steep dunes and thereby avoided that activity and the harm which resulted from it. "Factual causation" and "scope of liability" in respect of the video were established, with the result that the respondent proved that his injuries were caused by the appellant's breach of duty relating to the video.

[25] The appellant did not challenge any of these conclusions otherwise than by its quite narrow grounds of appeal to the effect that the risk was an "obvious risk" so that the claim was defeated by s 15 or s 19 of the Act.

[26] In relation to contributory negligence, the trial judge made the following findings. The true nature and extent of the risk of injury had not been brought home to the respondent but it was well known to the appellant. The respondent did not intentionally dive into the lake. He did know the depth of the water, having entered it on about nine or 10 previous occasions. He knew that the water was shallow immediately adjacent to the shore but he had not intended to enter the water head first at that point. He did not appreciate the risk of injury associated with the act of running down the dunes. There were not adequate signs warning of the risks. He was an Irish tourist unaccustomed to running down dunes but by the time of the subject event he had done so on nine or 10 occasions without hint of mishap and he had seen many others do the same.

[27] The trial judge observed that the principle criticism which could be made of the respondent was that he failed to study the signs closely:

> "…It was incumbent on him to read the signs. They plainly alerted him to a danger. They expressly warned against running down dunes. As I have said the problem is that the signs did not bring home the real risk in running down the dune – a reasonable reading of them could lead a visitor to think it was the act of running and diving that represented the risk of injury not running and jumping. Acting reasonably he may not have understood why the signs contained that message, but the message not to do so was nonetheless clear. The authorities advised against running down the dunes.
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> Had he read the signs and obeyed their message the accident would have been averted.
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> The difficulty is that all the other information that he received suggested there was no significant danger. Many others were doing precisely the same activity, without mishap. He had done so himself without mishap on numerous occasions as had his friends.
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> …In my view even though the signs did not adequately convey why visitors should not run down the dunes visitors enjoying a novel experience ought in their own interests exercise the caution that the authorities advise."[10]

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10 [2013] QSC 160 at [171] – [174].

[28] As I mentioned at the outset, the trial judge assessed the plaintiff's contribution to his injury at 15 per cent.

Did the trial judge err in finding that the risk of serious injury which was inherent in the activity in which the respondent sustained his injury was not an "obvious risk" within the meaning of s 13 of the *Civil Liability Act* 2003?

[29] The trial judge held that all relevant circumstances must be brought into account and the test was objective. Obviousness of risk was "merely a descriptive phrase that signifies the degree to which risk of harm may be apparent": *Consolidated Broken Hill Ltd v Edwards*.[11] The relevance of obviousness of risk was that "persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards": *Brodie v Singleton Shire Council; Ghantous v Hawksbury City Council*.[12] In *Wyong Shire Council v Vairy*[13] Tobias JA (Mason P agreeing) adopted the definition of "obvious" in the commentary to [343A] of the Restatement (Second) of Torts (1965)[14] as meaning "that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the [plaintiff], exercising ordinary perception, intelligence, and judgment …"; in that definition "'condition' refers to the factual scenario facing the plaintiff …". In *Jaber v Rockdale City Council*[15] Tobias JA referred to *Vairy* and observed that the focus of the enquiry was not upon the putative tortfeasor but upon a reasonable person in the tortfeasor's position and that whether or not a risk was "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 …".

[30] The trial judge considered that if the risk were defined as "the risk of serious injury from entering the water head first too close into the shore" then the risk was obvious, but if the risk were defined as "the risk of serious injury … because of the possibility of the sand giving way or tripping up at the crucial moment when running down the dune sufficiently to throw the person off balance and so converting an intended feet first jump into an unexpected and awkward head first entry into the water", or merely as "running down the sand dune into the water", then the risk was not "obvious" but was instead "a trap for the unwary".[16] The trial judge observed that "the depth of the water was known; the steepness of the dune evident; the firmness of the sand known – or presumed to be known; the ability to reach deep water easily with a running jump demonstrated … 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 …".[17]

[31] In holding that the risk which materialised was not an "obvious risk" the trial judge took into account his findings that: the risk of serious injury was not apparent to a significant percentage of the visitors to Lake Wabby; the respondent was relatively young, had no experience with sand dunes, and had not previously been to Lake Wabby; there was no apparent danger in jumping into the water, which was sufficiently deep for that activity; before the respondent was injured he saw numerous

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11 [2005] NSWCA 380 at [53] (Ipp JA).
12 (2001) 206 CLR 512, 581 (Gaudron, McHugh and Gummow JJ).
13 [2004] NSWCA 247 at [161].
14 Rest 2d Torts para 343A.
15 (2008) Aust Torts Reports 81-952 at [35].
16 [2013] QSC 106 at [64] – [65].
17 [2013] QSC 106 at [66] – [67].

other people at the lake engaged in a similar activity without incident; the respondent himself engaged in that activity on about 10 occasions without incident; it was not suggested that the respondent had observed the sand to give way so as to cause him to lose his footing on any previous occasion or that it had such an effect on any other person; the video which the plaintiff had seen included warnings about dangers presented by the topography of and activities on the Island but it did not indicate any problem with running down the sand dunes and jumping into any lake or Lake Wabby in particular; and there was no warning or description in the video, signs, or any published brochures, of the number of serious injuries which had occurred over the years at Lake Wabby or any of those injuries being associated with running down the sand dunes.

[32] The trial judge also took into account his finding that "[t]here was no sign or other warning in the plaintiff's immediate vicinity that running down the sand dune involved a risk of serious injury such as a broken neck".[18] The trial judge observed that the effectiveness of the signs to warn of a risk of serious injury in running down the sand dunes must be seriously doubted because:

(a) The 1993 assessment, the 2002 risk assessment, observations made by the respondent and his friends in 2007, and experience afterwards (there had been five more serious injuries since the respondent's incidents, three of which appeared to involve running or rolling down the sand dune and one which recorded a neck injury suggested the dune may have been involved)[19] consistently demonstrated that people ran down the dunes despite signs to much the same effect having been present for many years.

(b) The numbers of people not complying with the sign (insofar as it warned of a risk of serious injury in running down the sand dunes) suggested that the message was not being communicated.

(c) There were two problems with the signs:

(i) After the first sign there was a 2.5 kilometre arduous trek to the lake and the sign at the entrance to the lake competed for attention with the attraction of the lake.

(ii) The focus of the pictograms, if comprehensible at all, was diving and striking one's head on a hard surface below the surface of the water, suggesting that the problem was "running and diving" rather than "running or diving".[20]

The arguments

[33] It was not in issue that the decisions to which the trial judge referred accurately described the nature of the enquiry involved in deciding whether a risk was an "obvious risk" for the purpose of the relevant division of the Act. The principles have since been restated in similar language in *Laoulach v Ibrahim*.[21] The respondent referred also to the summary by Beazley JA (McColl and Basten JJA agreeing) in *Council of the City of Greater Taree v Wells*:[22]

> "Whether a risk is obvious is determined objectively, having regard to the particular circumstances in which the respondent (as the relevant plaintiff) was in: see *Fallas v Mourlas* [2006] NSWCA 32,

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18 [2013] QSC 106 at [68](h).
19 [2013] QSC 106 at [49].
20 [2013] QSC 106 at [71].
21 [2011] NSWCA 402 at [120] (Tobias AJA, Giles and MacFarlan JJA agreeing).
22 [2010] NSWCA 147 at [75]-[76].

> where Ipp, Basten and Tobias JJA determined that '*the position of the plaintiff"* comprehended the particular circumstances in which the risk materialised and the harm was suffered.
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> The question of obvious risk requires a determination of whether the appellant's conduct involved a risk of harm which would have been obvious to a reasonable person in the position of the respondent: *Carey v Lake Macquarie City Council* [2007] NSWCA 4 at [93]; (2007) Aust Torts Reports 81-874. In *Great Lakes Shire Council v Dederer & Anor; Roads & Traffic Authority of NSW v Dederer & Anor* [2006] NSWCA 101; (2006) Aust Torts Reports 81-860 Ipp JA (Handley and Tobias JJA agreeing) stated that the position of the plaintiff will include the plaintiff's knowledge and experience of the relevant area and conditions (see Ipp JA at [152]). (The question of obvious risk was not dealt with by the High Court in *Roads and Traffic Authority of NSW v Dederer*; see also Santow JA in *C G Maloney Pty Ltd v Hutton-Potts and Another* [2006] NSWCA 136 at [106]-[108]). In *Fallas v Mourlas* Basten JA, at [153], stated that for the purposes of s 5F, it was necessary to identify the circumstances and extent to which '*the aspects of 'the position' of the plaintiff* are to be ascribed to the reasonable person."

[34] Similarly, in *Glad Retail Cleaning Pty Ltd v Alvarenga*[23] Sackville AJA (with whose reasons Barrett and Gleeson JJA agreed) quoted that passage, observed that what was determinative was not the plaintiff's state of mind but what a reasonable person in the plaintiff's position would regard as obvious, and held that the plaintiff's evidence was relevant to the assessment of what a reasonable person would know about the risk.

[35] The appellant argued that a reasonable person would have heeded the signs and not engaged in this activity at all, or engaged in it only with an awareness that it involved a risk of serious injury which the person chose to take. The trial judge's finding of contributory negligence was submitted to be inconsistent with the exoneration of the risk as being an obvious risk; the trial judge should have found that the relevant risk was a risk of serious injury from an accident caused by running down the sand dune, that this risk was described on signs which a reasonable person in the appellant's position would have read, that the evidence of non-compliance by others with the warning signs did not justify the trial judge's conclusion that the warning signs were inadequate, that the respondent's own evidence was that if he had read the signs he would have understood the risk and not run down a dune and that, by operation of s 15(1) of the Act, the appellant did therefore not owe any duty to the respondent to warn him of that "obvious risk".

[36] The respondent argued that the trial judge's decision was correct for the reasons given by his Honour. It was submitted that the trial judge was correct in considering that the signs, particularly having regard to the pictograms, did not sufficiently convey the message that the particular activity in which the respondent engaged carried a risk of serious injury. This was not a case like *Road Traffic Authority of NSW v Dederer*[24] in which a plaintiff had engaged in a particular activity in the teeth of clear and unequivocal signage. In the respondent's submission, the effect of the evidence was that the respondent was a person who was attentive to risks of which he

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23 [2013] NSWCA 482 at [60]-[61].

24 (2007) 234 CLR 330.

was aware and he did not see or interpret the signs in the manner in which the appellant contended he should have done so; the respondent's evidence as to how he would have acted had he read the sign should be discounted on the ground that it was given long after the event and not the mindset a person would have had whilst on the track into Lake Wabby. The respondent emphasised the absence of any warning against the relevant risk on the video which the respondent had watched and that the respondent and his companions had complied with the warnings in that video. It was submitted that the appellant, by producing and distributing the video, effectively misled viewers, particularly foreign tourists, as to the apparent dangers of the island, Lake Wabby being the most prominent of those dangers and not being mentioned in the video.

[37] The respondent also argued that even if the relevant risk was an "obvious risk" within the meaning of s 13 of the Act, s 15 negated only a duty to warn but did not obviate a duty to take the "remedial step" of supplying further information about the safe use of the lake.[25] The respondent argued that such a distinction was made in *Chotiputhsilpa v Waterhouse*.[26]

Consideration

[38] The last mentioned argument should not be accepted. In *Chotiputhsilpa v Waterhouse* the Roads and Traffic Authority of New South Wales, the entity which was responsible for the design and construction of the ANZAC Bridge in Sydney, was found to have breached its duty to take reasonable care to protect pedestrians using the bridge from risk or harm by failing to provide adequate signs to direct the attention of pedestrians to the presence of a subway allowing access from one side of the bridge to the other. The plaintiff was hit by a car whilst attempting to cross in front of traffic on the bridge after he had not been able to find any other way across. In the passage cited by the respondent, Beazley JA pointed out that the Court was not concerned with a "warning sign as such" but with "signage that should have provided information that the evidence suggested was required as a matter of course in the design of the Bridge …". There is no analogy with the present case, in which the relevant finding of negligence, apparently reflecting the way in which the case was put to the trial judge, was that "the defendant breached its duty of care in failing to provide adequate warning of the dangers inherent in a visit to Lake Wabby by appropriate adaptation of the video, mentioning not only diving but running down the steep dunes with express reference to the long list of catastrophic and serious injuries sustained there over the preceding years."[27] That was unequivocally a claim based upon a duty to warn.

[39] The appellant did not argue and I would not accept that, if the signs were absent, the risk of serious injury resulting from a fall when running down the sand dune into the lake would have been obvious to a reasonable person in the respondent's position. Should the signs be taken into account in determining whether the relevant risk was "obvious"? The definition of "obvious risk to a person who suffers harm" in s 13(1) of the Act is applied in three sections in Div 3 of Pt 1 of the Act. In addition to sections 15 and 19, subsection 14(1) provides that "[i]f, in an action for damages for breach of duty causing harm, a defence of voluntary assumption of risk is raised by the defendant and the risk is an obvious risk, the plaintiff is taken to have been aware

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25 Respondent's Amended Outline of Argument, para 17.

26 [2005] NSWCA 295 at [61].

27 [2013] QSC 106 at [144].

of the risk unless the plaintiff proves, on the balance of probabilities, that he or she was not aware of the risk." There appears to be no incongruity in taking into account a warning sign in deciding whether a particular risk is an "obvious risk" for the purpose of sections 14 and 19. In relation to section 15, however, it arguably involves circularity –a defendant does not owe a duty to a plaintiff to warn of a risk to the plaintiff which is obvious because the defendant has warned the plaintiff of that risk.

[40] But the question relating to the signs is not whether they warned of the relevant risk in a way which fulfilled any duty of care owed by the appellant to the respondent. Rather, the question is whether, taking into account the effect of the signs in the context of other relevant circumstances, the risk which materialised was an "obvious risk" within the meaning of s 13 of the Act. In this case, the question may be restated as being whether, in terms of s 13(1), the risk of serious injury from an accident caused by running down the sand dune into the lake "is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of" the respondent. On the face of it, the presence of a sign warning against that precise activity forms one of the circumstances relevant to the question whether the risk would have been obvious to a reasonable person. Warning signs were taken into account in this way in *Great Lakes Shire Council v Dederer & Anor; Roads & Traffic Authority of New South Wales v Dederer & Anor*[28] by Ipp JA, with whose reasons Handley JA (in this respect) and Tobias JA agreed. (This aspect of the decision was not in issue in the appeal to the High Court.) The trial judge was right to take the signs into account.

[41] The signs should have been regarded as important since, as each sign notified, they had been placed by the State. The significant question then is whether, in all of the circumstances, the signs effectively communicated the risk which materialised so as to make that risk obvious to a reasonable person in the respondent's position.

[42] The trial judge speculated that the effectiveness of the signs in communicating the message otherwise conveyed by their text was put into doubt merely by the fact that large numbers of people did not comply with the signs. One circumstance which detracts from that proposition is that, as the trial judge accepted, the signs did effectively convey a message that death or serious injury was likely to result from diving into the lake, yet people continued to dive into the lake. A more compelling explanation for the extensive non-compliance with the signs is that numerous visitors simply ignored the signs, it being "human nature to enjoy running down a dune and jump into cooling water on a hot day".[29] The trial judge also saw possible reasons for the ineffectiveness of the signs to prevent people from running down the dunes as possibly being attributable to their location. As to the sign at the commencement of the track, the trial judge observed in that respect that it was "2.5 km back along an arduous track". Since that sign was at the commencement of a track close to where the respondent presumably alighted from the vehicle, there would appear to have been no particular difficulty in a reasonable person in the respondent's position reading and comprehending it. If its message had been half-forgotten in the time it took the respondent to walk the 2.5 km track, the message should have been reinforced by the identical sign at the end of the track as the lake came into view. The trial judge's observation that this sign "competes for attention with the attraction

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28 [2006] NSWCA 101 at [155] and [167]-[170].

29 [2013] QSC 106 at [105].

of the lake" may explain why its message was regularly ignored, but it does not justify a conclusion that the combination of both signs was insufficient to bring their message home to a reasonable person.

[43] However, those matters were not central to the trial judge's conclusion that the risk which materialised was not an "obvious risk". Rather, the trial judge's conclusion turned upon the nature of the risky behaviour conveyed by the signs. I agree with the trial judge that, when all of the circumstances are taken into account, the signs conveyed that serious injury or death might result from "running and diving" rather than from "running or diving". To put that another way, in all of the circumstances the signs did not effectively communicate that running down the dune into the lake involved the risk of serious injury which materialised.

[44] The signs warned of two categories of risks and gave a different explanation for each category of risks. The second warning was that "running … down the sand towards the lake is dangerous" because the sand dune was "steep". That warning described the activities as "dangerous" but, in contradistinction to the first warning, it did not warn that the activity involved a risk of injury which was very serious. The first warning, against running, jumping or diving into the lake (but not against running down the sand dune), did bring home that a very serious injury might result ("serious injury or death is likely to occur"), but the impression conveyed by the sign is that the explanation for this risk is that the lake is often shallower than it appears. That impression is reinforced by the pictograms. The pictograms apparently relate only to the first warning. The upper pictogram appears to show a man diving, probably into water (the darker area,) and striking his head against a jagged surface apparently under the water (although that is not entirely clear). The lower pictogram appears to show a man diving into water; the indication of waves perhaps suggests that its depth might be difficult to judge. The impression may be reinforced by a reasonable person's perception of the obvious danger of diving head first into water the depth of which is not readily ascertainable.

[45] The message in the signs that running into the lake would likely cause serious injury or death because the lake was often shallower than it looked was likely to be lost in the mind of a reasonable person by the discovery that the depth of the lake was in truth readily ascertainable. At least that is so in the conditions at the lake on the day when the respondent was injured. It was not suggested that there were any waves or turbulence in the lake, such as were conveyed by the lower pictogram, or that there was any other factor which made it difficult to judge the depth of the water. On the trial judge's unchallenged findings a reasonable person in the appellant's position quickly would have appreciated that the lake was shallow very close to the waters' edge and the bottom of the lake then dropped away rapidly. There was no apparent danger in running and jumping into the water in the way in which the respondent had done on about 10 occasions without incident. This might have been reinforced in the mind of a reasonable person by the circumstance that the video shown to the respondent included warnings about other dangers and activities on the Island but did not include any warning about running down the sand dunes into Lake Wabby.

[46] It is also necessary to take into account the evidence that the magnitude of the risk involved in the respondent's activity was unusually high. As the trial judge recorded in a footnote, the summary of the incidents in exhibit 11 included two incidents which specifically involve running down the sand dune, the first of which (6/6/1992) resulted in an injury involving pain in "C2 & C4 in Neck (patient evacuated by chopper)" and the second of which (12/4/1993) involved running and a trip resulting

in bruising to the lower back, kidney and ribs.[30] Another incident described as "running down sand dunes at Lake Wabby" (18/04/2009) was said to have resulted in "unconscious and nearly drowned". There was no challenge to the trial judge's finding that the record, on its face, revealed 13 injuries involving the back, neck or spine. Further, whilst most of the serious injuries were said to have occurred when the person injured was diving or attempting to dive, the trial judge found that it was a "moot point" whether the real risk of injury was from diving, given that it was very evident where the shallows of the lake were located and that the water deepened from the shallow area immediately adjacent to the waters edge; the trial judge considered that the plaintiff's facts might answer the question why visitors were entering the water head first close to the edge.[31] Also of significance was the 1993 advice by the appellant's manager that Lake Wabby was "clearly one of the most dangerous areas on park estate in Queensland by virtue of the number and seriousness of accidents there".

[47] The signs did not clearly communicate that the risk was so high. As Tobias JA observed in *Jaber v Rockdale City Council* in the passage quoted in [29] of these reasons, "the extent to which the probability of its [a risk's] occurrence is or is not readily apparent to the reasonable person in the position of the plaintiff" is relevant in determining whether or not the risk is "obvious".

[48] It is not difficult to accept that a reasonable person in the respondent's position would readily have concluded that running down the sand dunes towards the lake was dangerous in the sense that it involved the risk of some injury, such as a sprain or bruising as a result of a fall consequent upon looseness of the sand. The second warning on the signs should have reinforced such a danger in the mind of a reasonable person. But although the first warning on the signs stated that serious injury or death was "likely to occur" from running into the lake (or jumping or diving into the lake), the cumulative effect of the circumstances to which I have referred militate against a conclusion that this risk was so clear that it would have been "obvious" to a reasonable person in the respondent's position: the message in the pictograms that the real danger was diving into water of uncertain depth; the fact that the explanation for the risk that the lake was often shallower than it looked was falsified by the ease of ascertaining the true depth of the water; the presence of numerous persons repeatedly running down the sand dune into the lake in apparent safety; the respondent's own experience in running into the lake without mishap on nine or ten occasions; the absence of any warning of that activity in the video which warned of different dangers on the Island; and the unusually high degree of the risk of very serious injury involved in running down the sand dunes into the lake. These circumstances justified the trial judge in finding that the risk of serious injury which was inherent in the respondent's activity was not an "obvious risk" within the meaning of s 13 of the *Civil Liability Act* 2003.

[49] It should not be assumed that the trial judge omitted to take into account the respondent's own evidence that if he had read the sign he would not have engaged in the activity which led to his injury. The respondent said in cross-examination that if he had read the sign he would have done what the sign said and "I didn't dive into the lake anyway".[32] His evidence went beyond that. He was shown photographs of the signs and agreed that if he had seen the sign he would not have run or rolled in the

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30 Footnote 22.

31 [2013] QSC 106 at [45].

32 Transcript 1-45.

sand towards the lake and he would not have run, jumped or dived into the lake;[33] he would have "known not to really do any of the things you were doing with your friends on this particular day … [p]articularly not the running and jumping into the water …".[34] These answers were relevant to the allegation that the respondent was negligent in not heeding the signs, but they are not inconsistent with a conclusion that the risk of serious injury which eventuated was not obvious to the respondent or, more relevantly, would not have been obvious to a reasonable person in his position.

[50] The trial judge accepted that the respondent could be criticised for his "failure to study the signs closely", that it "was incumbent on him to read the signs", and that the signs alerted him to a danger and expressly warned against running down dunes. The trial judge reconciled those conclusions with the earlier finding that the risk was not obvious in the observation that the signs "did not bring home the real risk in running down the dune – a reasonable reading of them could lead a visitor to think it was the act of running and diving that represented the risk of injury not running and jumping." That did not involve any error. As I have indicated the fact that, having regard to the warning that running down the sand dune was dangerous, the respondent unreasonably failed to take precautions against the risk which materialised does not necessarily require the conclusion that the risk of serious injury in that activity would have been obvious to a reasonable person. The finding of contributory negligence is not in conflict with the finding that the risk which materialised was not an "obvious risk" within the meaning of s 13.

Did the trial judge err by making an insufficient reduction of the damages on account of the respondent's contributory negligence?

[51] Section 23 of the *Civil Liability Act* 2003 (Qld) provides:

> "(1) The principles that are applicable in deciding whether a person has breached a duty also apply in deciding whether the person who suffered harm has been guilty of contributory negligence 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 decided on the basis of what that person knew or ought reasonably to have known at the time."

[52] The appellant argued that the award of contributory negligence was inadequate. The appellant argued that the trial judge's findings (see [26] and [27] of these reasons) gave too much weight to the experience and observations of the respondent in his earlier runs down the sand dune because, in light of what was submitted to be the clear warning sign, the respondent should not have run down the dune at all. The respondent's notice of appeal contended for a finding of 65 per cent contributory negligence, but in oral submissions the appellant argued that the respondent should be held at least equally responsible for the accident.

[53] The knowledge which the respondent gained in his nine or 10 previous runs down the dune was relevant in the assessment of the degree to which the respondent departed

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[33] Transcript 1-48.

[34] Transcript 1-78.

from the standard of care of a reasonable person in failing to appreciate and heed the signs warning that running down the dune was dangerous. Whilst the sign did warn against running down the dunes it did not clearly convey that the respondent's activity carried a risk of serious injury of the kind involved in diving into waters of unknown depth. I am not persuaded that the trial judge made any error of fact or failed to take into account any relevant fact in making the apportionment. That being so, the appellant encounters the difficulty that, as Gibbs CJ, Mason, Wilson, Brennan and Deane JJ pointed out in *Podrebersek v Australian Iron & Steel Pty Ltd*:[35]

> "[a] finding on a question of apportionment is a finding upon a "question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds" … Such a finding, if made by a judge, is not lightly reviewed."

[54] The apportionment might be thought to be generous to the respondent. A larger award of contributory negligence would have been open, but I am not persuaded that the trial judge's apportionment was unreasonable or unjust such as to indicate error of a kind which would justify this Court in substituting a different apportionment.

Order

[55] I would dismiss the appeal with costs.

[56] **PHILIPPIDES J:** I have had the benefit of reading the reasons for judgment of Fraser JA which comprehensively set out the factual background, findings of the learned trial judge and argument on the appeal. The appeal centred on the issue of "obvious risk" in terms of s 13(1) of the *Civil Liability Act* 2003 (Qld).

[57] Whether there is "an obvious risk to a person who suffers harm" is determined by whether the risk "would have been obvious to a reasonable person in the position of that person": s 13(1) of the Act. That determination is an objective one, having regard to the particular circumstances in which the person was in, including for example, that person's knowledge and experience of the relevant area and conditions: see *Fallas v Mourlas,*[36] *Council of the City of Greater Taree v Wells*[37] and *Glad Retail Cleaning Pty Ltd v Alvarenga*.[38] Also pertinent in the circumstances of the present case was the signage present.

[58] I agree with Fraser JA, for the reasons he has identified, that the trial judge did not err in finding that the risk of injury which materialised was not an "obvious risk" within the meaning of s 13 of the *Civil Liability Act* 2003 (Qld). The risk of injury that materialised, that is, the risk of serious injury from an accident caused by running down the sand dune into the lake, was not a risk that in the circumstances would have been obvious to a reasonable person in the position of the respondent. Accordingly, as explained by Fraser JA, the respondent's claim was not defeated by s 15 or s 19 of the Act. Nor was the trial judge's finding as to contributory negligence inconsistent with the determination that the risk in question was not obvious.

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35 [1985] HCA 34; (1985) 59 ALJR 492 at 493-494.

36 (2006) 65 NSWLR 418 at [98].

37 [2010] NSWCA 147 per Beazley JA (McColl and Basten JJA agreeing) at [75]-[76].

38 [2013] NSWCA 482 per Sackville AJA (Barrett and Gleeson JJA agreeing) at [60]-[61].

[59] As to the trial judge's finding of contributory negligence of 15 per cent, I agree with Fraser JA that it has not been demonstrated that the finding proceeded on the basis of any error warranting interference by this Court in the apportionment made.

[60] I agree that the appeal should therefore be dismissed with costs.

[61] **HENRY J:** I agree with the reasons of Fraser JA for dismissing this appeal.

[62] It warrants emphasis that while the determination of whether the risk was obvious fell to be determined objectively, it did not fall to be determined in the abstract. It is obvious that running down a sand dune into a lake involves a risk of some injury. However sandy slopes and water present as apparently forgiving surfaces on or in which to fall. Whether running down a sand dune into a lake involves an obvious risk of serious injury will very much depend upon the individual circumstances of the case. It is a question of degree, turning upon an appreciation of the whole of the evidence, including evidence about warning signs. The learned trial judge's approach to the determination of the question, as explained by Fraser JA, was careful and well-reasoned. It involved no error and his Honour's conclusion was reasonably open on the whole of the evidence.

[63] I agree with the order proposed by Fraser JA.