IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C12 of 2015

BETWEEN:

PATRICK JOSEPH STEWART
First Appellant

BERYL ANN VICKERY (NEE STEWART)
Second Appellant

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MICHAEL PATRICK STEWART
Third Appellant

AND

BENJAMIN ALLAN ACKLAND
Respondent

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APPELLANTS' REPLY SUBMISSIONS

Part I - Publication

1. The appellants certify that this document is in a form suitable for publication on the Internet.

Part II – Notice of contention: *dangerous recreational activity*

2. The respondent's submissions at [30]-[33] that the "recreational activity" must be the "sport or activity as a whole", leaving the doctrine of contributory negligence to
30 apportion responsibility, is, as the respondent accepts, contrary to the reasons of the New South Wales Court of Appeal in *Fallas v Mourlas*[1]. For the reasons stated in that decision, s.5K should not be construed so as to exclude its application when a recreational activity which usually does not "involve a significant of physical harm" is undertaken in a manner which does make it "dangerous" on a particular occasion. The respondent's argument requires an unduly constrained meaning to be ascribed to each of the words "pursuit", "activity" and "involves" in s.5K. It would also result in denying the claim of a plaintiff engaging safely in an activity in particular circumstances where that activity as a whole usually involves a significant risk of physical harm, so that overall that activity is characterised as "dangerous" (for
40 example a competent skier skiing slowly on a flat beginners run).

3. The difficulty with the respondent's submission at [34]-[35] that an activity with only a small risk of catastrophic harm is not "dangerous" within the meaning of s.5K is that s.5K applies only to recreational activities and there are few, if any, activities

[1] (2006) 65 NSWLR 418

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which people engage in for "enjoyment, relaxation or leisure" which have a high probability of catastrophic harm actually occurring, as distinct from such a risk being always present but unlikely to eventuate. Whilst, as a general proposition, many people may accept a small possibility of suffering a catastrophic injury in order to enjoy otherwise challenging or thrilling recreational activities, few would accept the probability of such injury as 'recreation'. The respondent's interpretation of s.5K, which excludes activities in which there is only a small risk, in terms of probability, of catastrophic injury would exclude many, if not most, recreational activities. The respondent's proposed solution to that difficulty, namely, that s.5K applies only where there is a "significant risk of serious (but not necessarily catastrophic) harm" creates not only the difficulty of differentiating between "serious" and "catastrophic" harm but also would exclude activities where the risk is either catastrophic injury or none (for example, sky diving).

4. Contrary to respondent's submissions at [38]-[39], the appellants did not rely on Dr Olsen's expert opinion evidence concerning hyperflexion or hyperextension of the spine in their arguments on the meaning and application of the expression *significant risk of physical harm* in s.5K *CLA* or the expression *obvious risk* in s.5L.

5. In terms of Dr Olsen's evidence in that regard, the appellants relied only on the observations reported by Dr Olsen and tendered by the respondent that when he stood on the jumping pillow he did not compress the surface by much more than 50mm and on his oral evidence in chief that *"It felt like a solid surface almost"* [2]. These simple observations did not require biomechanical expertise. The appellants also relied on the photographs[3], taken on the day of the incident, showing people standing on the jumping pillow without apparently depressing the surface more than Dr Olsen's observations, as well as photographs[4] taken on a later date by Dr Olsen when he inspected the jumping pillow[5].

6. Dr Olsen's description, using medical terminology, of what happened to the respondent's body so as to damage the spinal cord and his calculation of the forces involved were not relevant to the appellants' arguments on the meaning and application of the expressions *significant risk of physical harm* and *obvious risk.* Nor was Dr Olsen's description of the difference between the dynamic of the compression of air in the jumping pillow being under pressure and the springs in a trampoline being under tension (respondent's submission [12]). The relevant matter was the simple description of the firmness of the surface of the jumping pillow compared to a solid surface, notwithstanding that the jumping pillow surface would "give the impression of yielding" when a person was jumping or walking on it.

7. The appellants' argument below was that the observations reported by Dr Olsen concerning the relative firmness of the jumping pillow when compared on the one hand to a trampoline and on the other hand to a solid surface were observations which *a reasonable person in the position of [the respondent]* within the meaning of s.5F

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[2] Exhibit 40; T297.11-35; Appellants' submissions in chief [12]-[13]
[3] Exhibit 7
[4] Exhibit 29
[5] The respondent was cross examined about the photographs taken by Dr Olsen at T 145.29-146.12

(i.e. a person familiar with trampolines and solid surfaces) could and would make without having to possess Dr Olsen's qualifications.

8. The reasoning of the primary judge appears to accept this argument. That is because, as the primary judge correctly observed, the finding by the primary judge that the respondent subjectively was unaware of the biomechanics of landing headfirst on the jumping pillow (respondent's submission [40]) was "not to the point" in determining what would have been objectively apparent to a reasonable person in the position of the respondent, because "as a matter of common sense there was always a possibility of the attempted somersault going awry and the plaintiff landing awkwardly"[6]. It is implicit in this finding that the surface of the jumping pillow was sufficiently firm to cause injury, regardless of whether the jumping pillow had a different dynamic to a trampoline and notwithstanding that it yielded to some extent when a person walked or jumped on it. However, it was not necessary to have regard to the technical evidence from Dr Olsen concerning the differences between trampolines and jumping pillows in order to conclude, for the purposes of that common sense analysis, that the jumping pillow was sufficiently firm to cause injury,

9. The evaluation by a reasonable person for the purposes of s.5F and thus s.5K (and implicitly s.5L) of the relative firmness of the jumping pillow compared to a solid surface and the evaluation of the risk of landing on the head or neck on such a surface would not be "significantly informed by the manner in which the jumping pillow is presented to patrons by the provider of the pillow" (respondent's submission [40]) and nor do the eight matters identified by the primary judge (respondent's submission [41]) affect such an evaluation by a reasonable person.

10. That is because, *first*, as Walmsley AJA and Robinson AJA correctly found[7] there is nothing in "the presentation of the jumping pillow" which represents that it is safe whatever use is made of it; *secondly*, a reasonable person would emphasise the comparison between the surface of the jumping pillow and a solid surface, rather than with a trampoline, when evaluating the risk of suffering a neck injury; *thirdly*, there was no evidence and no finding that a trampoline does not present any risk of neck injury[8]; and, *fourthly*, a reasonable person would place little or no weight on the absence of warnings when "as a matter of common sense there was always a possibility of the attempted somersault going awry and ... landing awkwardly".

11. The critical points in relation to assessing whether performing a backwards somersault on the jumping pillow *involves a significant risk of physical harm* are, *first*, that the characteristics of the jumping pillow, in terms of the relative firmness of the surface compared to a solid surface, were readily apparent to any reasonable observer; and, *secondly*, that the risks involved in landing with any force on the head or back of the neck are known instinctively as a matter of common knowledge, even by children[9].

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[6] Primary judgment [296]

[7] CA judgment [123]-[125]

[8] As Respondent's submission [12] notes, Dr Olsen opined that even a 'soft and floppy jumping castle' presented, objectively, a risk of cervical spine fracture

[9] That is, it is an example of an activity "which carry notorious risks well-known to ordinary members of the community" (respondent's submission [57])

12. Accordingly, a "common sense" objective evaluation by a reasonable person without biomechanical expertise would combine the common knowledge of the vulnerability of the neck with observation of the relative firmness of the surface of the jumping pillow compared to a solid surface to conclude that performing a backwards somersault (and other inverted manoeuvres) on the jumping pillow 'involves a significant risk of physical harm'.

Part III: Submissions in reply on appeal

13. Contrary to the substance of Respondent's submission [63], although the expression "personal autonomy" was not used, the written submission put to the primary judge by the appellants on duty of care was *the scope of the duty of care that they owed does not extend to an obligation to warn the plaintiff of the risk of injuring himself on the jumping pillow or to prohibit that activity. The plaintiff was a 21 year old man studying for a law degree. He was well capable of assessing the risks of performing inverted manoeuvres on the jumping pillow.*

14. Contrary to Respondent's submission [65], the concept of personal autonomy is not "built into the Civil Liability Act". Notwithstanding the heading "Duty of Care" to Division 2 of Part 1A *CLA,* ss.5B and 5C are directed to questions of breach of duty[10] and the question of the scope of duty is neither prescribed nor codified by the Act. That s.5L is expressed in terms of "not liable in negligence" does not convey either that a relevant duty is intended by parliament to be assumed whenever there is 'the materialization of an obvious risk of a dangerous activity engaged in by the plaintiff' or that the common law enquiry concerning the scope of a duty of care is constrained by the enactment of s.5L in particular or the Act more generally, except as expressly provided in ss.5H, 5M and 42. Other provisions similar to s.5L, which exclude liability, such as ss. 5I, 5O, 30 and 61, assume the existence of a duty, as well as breach and causation, but do not suggest that the Act excludes consideration of any other factor which may operate to limit the scope of the duty of care which is assumed to apply.

Dated: 20 November 2015

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[10] *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48, 239 CLR 420 at [13]