

### Problem Questions:

Any action of P against the State will likely fail due on policy grounds. Courts take an incremental approach. **IMPORTANT TO STATE IN EXAM.**

**s18A of Limitation act – 3 years to bring action**

**S33 of interpretation act** 1987– to prove “ordinary natural meaning”

### **WEEK 7: Defences to Negligence**

#### **Notes:**

- S5L
- Doing recreational activity (defined 5K) + obvious risk
- **Falvo v Oztag**
  - Tripped on an uneven playing surface – not a risk of Oztag
  - Not a contact sport therefore not a dangerous recreational activity
  - Burden of taking precautions – council would not be able to afford to maintain high quality of fields
- **Lormine** – whale watching – not a dangerous recreational activity
- **Dedederer** - diving off a bridge into shallow water IS a dangerous recreational activity **Doubleday** – jumped on trampoline with roller-skates – risk not obvious to a 7 year old child
- s5M, 5N
- s50 – intoxication
- s54 – illegality
- s57 – good Samaritan

#### Noreen v Perisher Blue

##### **1. Duty –**

- a. occupier/entrant (**Australian Safeway Stores v Zaluzna**)/ (**Romean v Conesevation**)
- b. Falls under a class of people.
- c. Foreseeability – Reasonable to foresee that someone who came in with that sign would use it to hurt themselves. (**Chapman v Hearse**)
- d. Not far fetched or fanciful (**Wyong v shirt**)
- e. Not insignificant
- f. Reasonable person test (**Donoghue v Stevenson**).

##### **2. Breach: s 5B(1)**

- a) Must have known
- b) Not insignificant
  - a. Would a reasonable person have taken precautions? (**s5B(1)c**)
    - i. Objective test (**Blyth v Birmingham**)
    - ii. Beginners run so should be smooth (**Collins v Hertfordshire County Council**)

##### **3. Reasonable**

- Safe gear: helmets
  - Hard to enforce
  - Causation
- Prohibit/confiscate

- Low burden
- But for causation straight forward
- Warning signs
  - s 5H no duty to warn if obvious
  - s 5D(3) subjective causation
- Mark boundaries with flags
  - s5D(3) subjective causation
- Supervision/instruction
  - Expense – but PB has money
  - More supervision – but for (Adeels)
- Remove rocks
  - ss 5B(c), 5C(a) high burden
  - Social utility – natural environment (Romeo; Auction Paintball)
  - But would have prevented injury
- Fence off rocks
  - Replace one risk with another; wouldn't prevent injury

Obviousness of Risk – will affect breach (Romeo v Conservation Commission) [Cliffs held as obvious risk] (Vairy v Wyong Shire Council) [shallow water was held as obvious risk, obiter: it may negate all breach of duty]

#### 4. Causation:

- P needs to prove causation s5E
- Factual Causation (**5D1a** satisfied by
  - but for **s5D1a**.. but for the D failing to smooth out the surface/taken precautions the damage would not have occurred... may fail as it may snow again.. precaution would be to remove rock... but for would succeed here.
  - No novus actus – or maybe... snow melted more thus rock was protruding. (chapman v hearse)

#### 5. Remoteness: ss5D(4))

- No issue as very direct.
- Kind of damage Kavanagh v Akhtar – could fail as a 600mm rock is so small in comparison to the injury... however a reasonable person would think it is not too remote Wagon Mound (No 2)) [

#### 6. Defences

Contributory Negligence:

- D didn't take reasonable care for her own safety as she was tobogganing head first during a dangerous activity.
- Law Reform (Miscellaneous Provisions) Act 1965 (NSW) s9(1).
- **P failed to take the precautions a reasonable person would have taken for their own protection; AND, (Froom v Butcher)**
- **reasonable person in the position of P person ... on the basis of what that person knew or ought to have known at the time" (s5R(2));**
- Damage was partly caused by P's actions of going head first which doesn't happen on ski runs. Froom v Butcher)
- **The damage was reasonable foreseeable** (the injury within the risk); AND, (Froom v Butcher);
- **Causation must be proven** as in classic negligence (Gent-Diver v Neville)

Obvious Risk:

- Definition First

an **objective test** (ss5F(1)); obvious means "the condition and risk are apparent and would be recognized by a reasonable man in P's position, exercising ordinary