Supreme Court of New South Wales - Court of Appeal Decisions

Fallas v Mourlas [2006] NSWCA 32 (16 March 2006)

CITATION: Fallas v Mourlas [2006] NSWCA 32

FILE NUMBER(S):

40755/05

HEARING DATE(S): 16/02/06

DECISION DATE: 16/03/2006

PARTIES:

Alexander Con Fallas (Appellant)

Con Mourlas (Respondent)

JUDGMENT OF: Ipp JA Tobias JA Basten JA

LOWER COURT JURISDICTION: District Court

LOWER COURT FILE NUMBER(S): 2638/04

LOWER COURT JUDICIAL OFFICER: Quirk DCJ

COUNSEL:

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SOLICITORS:

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CATCHWORDS:

NEGLIGENCE - injury sustained through accidental discharge of handgun - application of s 5L of the Civil Liability Act 2002 (NSW) - whether hunting kangaroos by spotlight is a "dangerous recreational activity" within the meaning of s 5K of the Civil Liability Act - discussion of meaning of the term "significant" - whether particular activities engaged in by

the plaintiff should be segmented - relationship between a "significant risk" and an "obvious risk" for the purpose of s 5L - whether the risk that materialised was an "obvious risk" of the dangerous recreational activity as defined in s 5F of the Civil Liability Act. D

LEGISLATION CITED:

Civil Liability Act 2002 (NSW), ss 5F, 5K, 5L

DECISION:

Appeal dismissed with costs.

JUDGMENT:

IN THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL

CA 40755/05

DC 2638/04

IPP JA

TOBIAS JA

BASTEN JA

Thursday 16 March 2006

CON FALLAS v CON MOURLAS

Judgment

FACTS

Mr Alexander Con Fallas, the defendant below, accidentally shot his friend, Mr Con Mourlas, the plaintiff below, in the leg while hunting kangaroos. At the time of the accident, the four men were participating in an activity referred to as “spotlighting” or shooting kangaroos at night with the aid of a spotlight.

The men got into a vehicle and drove into the bush in search of kangaroo at around 10.30pm. Mr Fallas was driving the vehicle and Mr Mourlas sat in the front passenger seat. Mr Mourlas agreed to hold the spotlight and shine it out of the window of the vehicle while the other men shot. After about 5 to 10 minutes of driving, two of the men got out of the vehicle and began walking in front while the vehicle followed them. At some stage the vehicle stopped and Mr Fallas climbed out of the vehicle with a handgun to join the other men.

Mr Fallas returned to the vehicle still holding the handgun. Mr Mourlas asked him not to come in to the vehicle with a loaded gun. Mr Fallas gave repeated assurances that the gun was not loaded and that it was safe for him to enter the vehicle. Once Mr Fallas was inside the vehicle, Mr Mourlas once again asked him not to bring the gun inside the vehicle and to point the gun outside. Mr Fallas began "clocking [the gun] back and forward" in an effort to un-jam it. As Mr Fallas was doing this he pointed the gun towards Mr Mourlas's direction. There was then an accidental discharge of the gun resulting in Mr Mourlas being shot in the leg and suffering injury.

At trial, Mr Mourlas contended that Mr Fallas was liable to him in negligence for the damages he had incurred. One of the grounds on which Mr Fallas denied liability was that he was entitled to immunity under s 5L of the *Civil Liability Act* 2002 (NSW).

Quirk DCJ upheld Mr Mourlas's claim and found that Mr Fallas had been negligent. Her Honour was not satisfied that the activity being undertaken at the time Mr Mourlas was shot was a "dangerous recreational activity" as defined by s 5K. Further, her Honour held that Mr Mourlas "did not suffer harm as a result of the materialisation of an obvious risk of a dangerous recreational activity". Accordingly, her Honour concluded that s 5L did not assist Mr Fallas. Her Honour handed down a verdict and judgement for Mr Mourlas in the sum of $98,467.

Is spotlighting a "dangerous recreational activity"?

HELD per Ipp JA:

i. An objective test is required in determining whether, in terms of s 5K of the *Civil Liability Act* 2002 (NSW), a recreational activity is "dangerous".

ii. The word "significant", in the expression "significant risk of physical harm", lays down a standard lying somewhere between a trivial risk and a risk likely to materialise.

iii. A significant risk that converts a recreational activity into a dangerous recreational activity may be an entirely different risk from the risk (which may be obvious or not) that materialises. Thus, s 5L may be held to apply where the significant risk (converting a recreational activity into a dangerous one) differs from the obvious risk that materialises.

iv. The question of whether a particular activity may be dangerous should be determined by reference to the particular activities engaged in by the plaintiff at the relevant time and to the actual circumstances giving rise to the harm. This could require segmenting the particular activities the plaintiff was engaged in.

v. The activity that Mr Mourlas was engaged in was sitting in the vehicle, holding the spotlight for the shooters outside, on the basis that at various times one or more of the shooters might leave or enter the vehicle with guns that might or might not be loaded. That limited activity is distinguishable and separate from the other activities, which fall under the general description of "shooting kangaroos by spotlight".

vi. In the particular circumstances of this case, there was a significant risk that one of the men, while leaving or entering the vehicle as Mr Mourlas was operating the spotlight, might handle a loaded gun in a negligent manner and cause someone in the vehicle to get shot.

Therefore, the activity Mr Mourlas was engaged in carried a significant risk of physical harm and was a “dangerous recreational activity” within the meaning of s 5K.

Held per Tobias JA:

i. Generally, for a risk to qualify as significant, it must have a real chance of materialising. For a risk to have a real chance of materialising it must lie somewhere between a trivial risk and a risk likely to materialise, although it is probably closer to the second than the first.

ii. In determining whether the relevant recreational activity involves a significant risk of physical harm, one must identify that activity at a relatively detailed level of abstraction by including not only the particular conduct actually engaged in by the respondent but also the circumstances which provide the context in which the conduct occurs.

iii. Having regard to the circumstances of the case, particularly the inexperience of the participants and the excitement and possible bravado involved in the shooting, the subject activity was clearly capable of involving a significant risk of physical harm. Therefore, the subject activity was a “dangerous recreational activity” within the meaning of s 5K.

Held per Basten JA:

i. The burden of proof in establishing a defence under s 5L falls on the defendant (Ipp JA agreeing).

ii. In the present case, once the activity was identified as shooting kangaroos at night, and the relevant risk was identified as a wound caused by accidental discharge from a firearm, it is not possible to characterise a person who merely holds a spotlight as not involved in the activity because they are not involved in the actual shooting. It follows that the Mr Mourlas was engaged in the recreational activity of shooting kangaroos at night.

iii. In considering whether a “risk of physical harm” is “significant” the seriousness of the harm must be considered. If the harm is potentially catastrophic a very low level of risk may be treated as “significant”. On the other hand, where the harm is not serious at all, the risk may not be considered significant until it reaches a much higher level.

iv. The phrase “significant risk” requires an objective test not dependent upon whether the plaintiff was aware of the risks involved in a particular activity.

v. There are three possible ways of considering whether a risk is significant:

(a) assume that any risk will be significant because the results of it eventuating are likely to be catastrophic;

(b) draw an inference from statistical evidence; or

(c) examine the particular circumstances of the case.

Adopting the first approach would not reflect the statutory test set out in s 5K. The parties did not run their case based on the other two approaches. Therefore, it has not been established that there was a significant risk of injury from the accidental discharge of a firearm whilst

shooting kangaroos at night, in the circumstances in which the plaintiff was involved. Hence, it has not been established that the subject activity is a "dangerous recreational activity".

Was the risk that materialised an "obvious risk"?

Held per Ipp JA:

i. In cases where the obvious risk is of being harmed by the conduct of a person, for s 5L to become relevant the obvious risk must at least be of negligent conduct. Section 5L, therefore, may involve a plaintiff in certain circumstances having to accept the risk of another person being negligent.

ii. The risk of a person being negligent in certain circumstances might be obvious, but in the same circumstances the risk of a person being grossly negligent might not be obvious.

iii. Mr Fallas's conduct comprised of groundless reassurances and persistent failures to take steps to ensure that there would be no accident caused by the handgun, all in the face of Mr Mourlas's earnest requests to be careful. The eventual shooting was gross negligence on the part of Mr Fallas. In the particular circumstances, the risk of Mr Mourlas being harmed by conduct as extreme as that of Mr Fallas did not constitute an obvious risk as defined by s 5F.

Held per Tobias JA:

i. To determine whether the harm suffered by Mr Mourlas was the result of the materialisation of an "obvious risk" under s 5F requires regard to be had to the particular circumstances in which the harm was suffered and a determination whether the risk which resulted in the harm would have been obvious to a reasonable person in Mr Mourlas's position.

ii. In the current factual scenario it would have been apparent to a reasonable person in Mr Mourlas's position that the conduct of Mr Fallas on re-entering the vehicle with his handgun (which may or may not have been loaded to his knowledge) carried with it the risk of the gun being discharged causing serious harm.

iii. A reasonable person in Mr Mourlas's position should be taken on the probabilities to have been aware that Mr Fallas's reassurances, that the gun was not loaded and that it was safe, were unreliable given his continued conduct in fiddling with his gun, which he had already indicated was jammed, within the confines of the vehicle. Therefore, the risk was obvious within the meaning of the definition of that expression in s 5F. It follows that Mr Fallas has satisfied the requirements of s 5L(1) and as a consequence is not liable in negligence for the injuries that Mr Mourlas sustained.

Held per Basten JA:

i. For s 5L to be engaged, at least one of the significant risks, which attend a particular recreational activity, must materialise and result in the harm suffered by the plaintiff. Further, that risk must be an "obvious risk" within the meaning of s 5F. These two elements must, to an extent, be treated together.

ii. The application of s 5L(1) will depend upon the level of particularity at which "the circumstances" are identified and those aspects of "the position" of the plaintiff which are to be ascribed to the reasonable person, for the purposes of the definition in s 5F(1).

iii. There must have been a risk that there was a bullet in the gun prior to its discharge, even though the defendant assured the plaintiff that there was not. There was similarly a risk, which would have been obvious to Mr Mourlas that the gun may, through a careless act, be pointed at him. It follows that the risk which materialised, namely the accidental discharge of the gun whilst pointed at Mr Mourlas, was an "obvious risk" whatever the knowledge, belief and circumstances which existed immediately prior to the discharge.

iv. The risk of an accidental discharge of the gun, whilst sitting in a vehicle, may be of a different order to the risk of such an accident whilst participating in the shooting. While it may still be an obvious risk, it may have been too far removed from the activity to form part of it. The evidence to which the Court was taken left doubt that the risk that materialised was a risk of the dangerous recreational activity.

Summary of findings

Held per Ipp and Tobias JJA (Basten JA contra):

a. The activity Mr Mourlas was engaged in was a "dangerous recreational activity" within the meaning of s 5K.

Held per Ipp and Basten JJA (Tobias JA contra):

b. The risk that materialised did not constitute an "obvious risk" of the dangerous recreational activity as defined in s 5F.

Held per Ipp and Basten JJA (Tobias JA dissenting):

c. The appeal should be dismissed with costs.

ORDER

Appeal dismissed with costs.

IN THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL

CA 40755/05

DC 2638/04

IPP JA

TOBIAS JA

BASTEN JA

Thursday 16 March 2006

CON FALLAS v CON MOURLAS

Judgment

1 **IPP JA:**

The application for leave to appeal and the appeal

2 Mr Alexander Con Fallas, the defendant below, accidentally shot his friend, Mr Con Mourlas, the plaintiff below, while hunting kangaroos by spotlight. Mr Mourlas was shot in the leg and sustained a comminuted fracture and other injuries. He sued Mr Fallas for the damages he had thereby incurred. At the trial, Mr Mourlas contended that Mr Fallas was liable to him in negligence for the damages he had thereby incurred. One of the grounds on which Mr Fallas denied liability was that he was entitled to immunity under s 5L of the *Civil Liability Act* 2002 (NSW).

3 Quirk DCJ upheld Mr Mourlas's claim and found that Mr Fallas had been negligent. She rejected Mr Fallas's argument that Mr Mourlas had been guilty of contributory negligence. She held that s 5L did not assist Mr Fallas. Her Honour handed down a verdict and judgment for Mr Mourlas in the sum of $98,467.

4 Mr Fallas applied for leave to appeal against the verdict and judgment. The application for leave to appeal was heard concurrently with the appeal. At the conclusion of argument the application for leave to appeal was granted and the decision on appeal was reserved.

5 On appeal, Mr Fallas did not dispute that he had negligently caused Mr Mourlas's injuries and did not challenge the finding that Mr Mourlas had not been guilty of contributory negligence. The argument turned on s 5L. Mr Fallas submitted that Quirk DCJ had erred in holding that s 5L did not render him immune from Mr Mourlas's claim.

The trial judge's findings concerning ss 5K and 5L

6 Section 5L provides:

"**No liability for harm suffered from obvious risks of dangerous recreational activities**

(1) A person (**the defendant**) is not liable in negligence for harm suffered by another person (**the plaintiff**) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.

(2) This section applies whether or not the plaintiff was aware of the risk."

7 Certain of the expressions used in s 5L are defined in s 5K. Section 5K provides:

"In this Division:

dangerous recreational activity means a recreational activity that involves a significant risk of physical harm.

obvious risk has the same meaning as it has in Division 4.

recreational activity includes:

(a) any sport (whether or not the sport is an organised activity), and

(b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and

(c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure."

8 By s 5K, "obvious risk" in s 5L has the same meaning as it has in s 5F. Section 5F provides:

"**Meaning of 'obvious risk'**

(1) For the purposes of 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 circumstances that gives rise to the risk) is not prominent, conspicuous or physically observable."

9 Quirk DCJ was not satisfied that the activity being undertaken at the time Mr Mourlas was shot was a "dangerous recreational activity" as defined by s 5K. Further, her Honour held that Mr Mourlas "did not suffer harm as a result of the materialisation of an obvious risk of a dangerous recreational activity". The argument on appeal concerned only whether her Honour was wrong in these two findings.

10 The deceptively simple wording of s 5K conceals difficult questions of construction. The difficulties concern not only the meaning of words and expressions but also the nature of the circumstances that that must be taken into account when determining the scope of the different risks and activities involved. On its face, s 5L concerns the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff. These straightforward words carry with them complexities when regard is had to the definitions of "recreational activity", "dangerous recreational activity", and "obvious risk".

The "significance" of a risk

11 To assess whether a "recreational activity" is "dangerous", it is necessary to determine whether the recreational activity "involves a significant risk of physical harm" (s 5K).

12 In my reasons in ***Falvo v Australian Oztag Sports Association*** [2006] NSWCA 17 (with which Hunt AJA and Adams J agreed) I said (at [30]):

"In substance, it seems to me, that the expression constitutes one concept with the risk and the harm mutually informing each other. On this basis the "risk of physical harm" may be "significant" if the risk is low but the potential harm is catastrophic. The "risk of physical harm" may also be "significant" if the likelihood of both the occurrence and the harm is more than trivial. On the other hand, the "risk of physical harm" may not be "significant" if, despite the potentially catastrophic nature of the harm, the risk is very slight. It will be a matter of judgment in each individual case whether a particular recreational activity is "dangerous".

13 I agree with Basten JA that an objective test is required in determining whether in terms of s 5K a recreational activity is "dangerous".

14 But what does "significant" mean in s 5K? I think it is plain that it means more than trivial and does not import an "undemanding" test of foreseeability as laid down in ***Wyong Shire Council v Shirt [1980] HCA 12;*** (1980) 146 CLR 40.

15 The epithet "real" was suggested during the course of argument. But "real" can mean a risk that is not far-fetched or fanciful (***Wyong Shire Council v Shirt*** at (48)) and "significant" means more than that.

16 On the other hand, it seems to me, a "significant risk" does not mean a risk that is likely to occur; that would assign to it too high a degree of probability. Had it been the legislature's intention to lay down an element for the application of s 5L involving the probability of harm occurring, different words would have been used.

17 In the present context, the word "significant" - coloured or informed as it is by the elements of both risk (which it expressly qualifies) and physical harm (which is indivisibly part of the expression under consideration) - is not susceptible to more precise definition.

18 Thus, I do not think it practicable or desirable to attempt to impose further definition on "significant", other than saying that the term lays down a standard lying somewhere between a trivial risk and a risk likely to materialise. Where the particular standard lies between these two extremes cannot be prescribed by any rule of thumb. Each individual case will have to depend on its particular circumstances and by having regard to the ordinary meaning of the term.

19 What evidence is relevant to prove the existence of a significant risk of physical harm?

20 The degree of likelihood of a risk occurring may be established in many ways. In ***Seltsam Pty Ltd v McGuiness [2000] NSWCA 29;*** (2000) 49 NSWLR 262 Spigelman CJ (at 278) referred to epidemiological evidence that suggested "some increase in risk". The Chief Justice said that evidence was relevant to causation. He observed:

"...courts must determine the existence of a causal relationship on the balance of probabilities. However, as is the case with all circumstantial evidence, an inference as to the probabilities may be drawn from a number of pieces of particular evidence, each piece of which does not

itself rise above the level of possibility. Epidemiological studies and expert opinions based on such studies are able to form `strands in a cable' of a circumstantial case."

21 The Chief Justice was considering whether evidence of increased risk might be taken into account "for the purpose of drawing the inference that the particular exposure caused or materially contributed to the injury in the specific case". Nevertheless, his remarks indicate that epidemiological evidence may be relevant to establish the degree of risk involved in a given activity.

22 Expert opinion may be relevant to the degree or incidence of a risk, as might the application of logic, common sense or experience to the particular circumstances of the case.

23 But in the end, whatever the likely incidence of the risk, what has to be determined is more than that. The composite question is whether there is a significant risk of physical harm and that requires a value judgment dependant on the circumstances of each individual case.

24 I would add that I agree with Basten JA for the reasons he gives that the appellant bore the burden of proof in regard to the issue of whether a significant risk of physical harm existed (and in regard to the other elements of s 5L as well).

The differences between a “significant” risk and an “obvious” risk

25 A significant risk that converts a recreational activity into a dangerous recreational activity may be an entirely different risk from the risk (which may be obvious or not) that materialises. Two examples illustrate this.

26 Professional cricket at first-class level is arguably a dangerous recreational activity as it involves several different significant risks of physical harm. One such risk is the risk of a batsman being struck by a bumper from a fast bowler.

Assume that, at a time when the ball is “dead”, a careless fielder throws the ball and seriously injures a batsman who is not looking. The risk of this occurring is so low that it is arguably not a significant risk of physical harm. This means that the batsman was injured by the materialisation of a risk, the existence of which does not render cricket a dangerous recreational activity (which, arguably, it is).

But the risk of being struck by a ball thrown after the ball has become dead may arguably be an obvious risk – s 5F(3) provides that a risk can be obvious even though it has a low probability of occurring. So the risk that materialises may not be significant but may be obvious.

If the injured batsman sues the fielder, the fielder may be able to establish that cricket is a dangerous recreational activity, even if the injury was caused by the materialisation of a risk that was not significant. And the fielder may arguably also be able to persuade a court that the batsman was injured by the materialisation of an obvious risk. On this basis, s 5L would provide the fielder with a defence where the obvious risk that materialised was not a significant risk of harm – it was an entirely different risk.

27 Take another example. Boxing is arguably a dangerous recreational activity on the ground that a boxer may be struck by a series of heavy blows to the head and body. But being

punched in the kidneys after the bell has rung for the end of a round may not be the materialisation of a significant risk. It may, however, be the materialisation of an obvious risk, and a boxer who is so injured may be met with a s 5L defence if he sues his opponent.

28 Thus, s 5L may be held to apply where the significant risk (converting a recreational activity into a dangerous one) differs from the obvious risk that materialises. Accordingly, differences in the risks may occur not only by reason of the differences in meaning between the epithets "significant" and "obvious" but because the putative significant risks of physical harm stem from facts that differ from the facts that actually create the obvious risk that materialises.

29 Basten JA has expressed the opinion that "[f]or s 5L to be engaged, at least one of those [significant] risks must materialise [as an obvious risk] and result in harm suffered by the plaintiff". I respectfully disagree. In my view, there is nothing in s 5L that indicates that the obvious risk that materialises must be one of the significant risks that transforms a recreational activity into a dangerous recreational activity. The examples I have given illustrate how the significant risks of a recreational activity may be entirely different from the obvious risk that materialises.

Different levels of generality or abstraction

30 In determining whether a recreational activity is dangerous, difficult questions arise in defining the scope of the recreational activity to which the expression "significant risk of physical harm" is to be applied. At what level of generality or abstraction is the scope to be ascertained?

31 "Recreational activity" is defined by s 5K in terms of very broad generalities. It comprises any sport, be it an organised activity or not (para (a)), any pursuit or activity engaged in for enjoyment, relaxation or leisure (para (b)) and even any pursuit or activity engaged in at a place where people ordinarily engage in sport or any pursuit or activity engaged in for enjoyment, relaxation or leisure (para (c)).

32 The expressions "in the circumstances" and "a reasonable person in the position of [the defendant]" appear in the definition of obvious risk in s 5F. These expressly require regard to be had to the circumstances of the individual case when determining whether a risk is obvious, but are omitted from the definition of recreational activity.

33 The breadth of the definition of recreational activity and the omission in it of any reference to the particular circumstances of the case, and to the position of the plaintiff, tend to suggest that the scope of the recreational activity is to be determined at a higher level of generality than the inquiry into whether a risk is obvious.

34 That is to say, these matters tend to suggest that, in determining whether a recreational activity involves a significant risk of physical harm, regard is to be had only to the activities ordinarily involved in that particular recreational activity and not to the particular and limited activities undertaken in fact by the plaintiff.

35 There are, however, countervailing indications.

36 Factors such as time, place, competence, age, sobriety, equipment and even the weather may make dangerous a recreational activity which would not otherwise involve a risk of harm (and the converse may be the case). A cliff walk in daytime may be safe but at night it may be dangerous. Walking along the edge of a cliff may be dangerous at any time but walking on a country road not. Waterskiing may not be dangerous for a competent skier but the same may not be said for a novice. A recreational activity may dangerous for a child but not for an adult. Participating in a recreational activity might be safe for a sober person but dangerous for one who is intoxicated. Fencing with appropriate protective equipment might not be dangerous but the same could not be said for fencing without protection. Sailing in calm seas for a short period might be safe, but sailing in a raging gale might be classified as dangerous.

37 As the question whether a recreational activity may be dangerous will often depend on the particular circumstances, if such a determination does not take account of those circumstances it is likely to be unreliable, may be unfair and may give rise to injustice.

38 The unfairness may be particularly apparent where the recreational activity is generally regarded as having significant risks of physical harm, but the plaintiff, by limiting (perhaps deliberately) his or her participation in the activity, reduces those risks to a point where they are not significant risks of physical harm. In my view it would be unfair or unjust for such a plaintiff to have to face a s 5L defence. The same might be said of a plaintiff who is injured by the materialisation of an obvious risk that was not a significant risk of the activity concerned.

39 The higher level of generality approach may also give rise to unfairness to defendants. A recreational activity may generally not be regarded as having significant risks of physical harm, but the way in which a particular plaintiff engages in that activity may give rise to such risks. It would be unfair in those circumstances to deprive a defendant of the s 5K defence.

40 I shall give two examples that illustrate the point I am attempting to make.

41 Assume that a plaintiff is fearful of heights but agrees to assist a friend during an abseiling expedition. The plaintiff stands at the top of a cliff (in what ordinarily would be regarded as a safe position) and acts as a belay, pulling the rope as his friend descends down the cliff. At no time does the plaintiff intend to abseil down the cliff himself. Assume that he is severely injured because of the negligence of a third party responsible for affixing the abseiling equipment and selecting an appropriate location for the abseiling to take place. Assume further that such negligence amounts to the materialisation of an obvious (but not significant) risk involved in abseiling. If the plaintiff is to be regarded as having participated in abseiling, generally, and not merely acting as a belay, it would follow that he would be held to have engaged in a dangerous recreational activity. Section 5L would apply and he would have no claim for negligence. In my view, that would be an unfair result. On the other hand if regard is had only to the limited activities which this notional plaintiff was undertaking, he was arguably not engaged in a dangerous recreational activity and his claim would then not be defeated by s 5L.

42 Another example illustrates the converse situation. Assume that a boy in his early teens visits a zoo. That would be a recreational activity but not a dangerous one. Assume that the boy notices that the fencing to the antelope enclosure has no barbed wire at the top and no measures have been taken to prevent persons from climbing over. He proceeds to climb over, enters the enclosure and is gored by a buck. He sues the Authority that controls the zoo on the

ground that it knew that young persons visited the zoo, would be attracted to the animal enclosures, and the more adventurous might attempt to enter them. He alleges that the Authority was negligent in having a fence that young people could readily climb. If the activity engaged in by the boy in this example is not segmented, and he is regarded merely as having been engaged in the recreational activity of visiting the zoo, s 5L would not apply. This would be the case even though the harm the boy suffered was caused by the materialisation of an obvious risk of a recreational activity that, by reference to the actual facts, was dangerous (and brought about by him).

43 These potential situations of unfairness and injustice can be avoided if, for the purposes of s 5K, the scope of the recreational activity is determined by reference to the particular activities actually engaged in by the plaintiff at the relevant time. This would enable a decision to be made by reference to the actual circumstances giving rise to the harm, and not to a notional and artificial construct that bears little relationship to the reality of the case and to what actually occurred.

44 The matter is essentially one of statutory construction. In a case of clear ambiguity (as is the case with s 5K and s 5L), a construction that might result in potential unfairness and injustice should be avoided and a fair and just construction is to be preferred. There are no other policy factors involved. Deciding issues under s 5L by reference to all the circumstances that actually occurred may benefit a plaintiff in one case and a defendant in another.

45 Many of the provisions of the *Civil Liability Act* are modelled on the Recommendations of the Final Report by the panel appointed by the Commonwealth and State Governments to review the law of negligence (Second Reading Speech, Hansard 23 October 2002 at 5765). Sections 5K and 5L are based on Recommendations 11 and 12, although they differ materially from those Recommendations by not incorporating the element of voluntariness. Nevertheless, part of the reasoning expressed to be the rationale for Recommendations 11 and 12 applies to ss 5K and 5L. That is, a plaintiff who engages in a dangerous recreational activity in circumstances where the risks are obvious is to be regarded as having assumed those risks (see paras 4.20 to 4.24 of the Final Report).

46 In my view, the fulfillment of that rationale should be regarded as the purpose of the legislature in enacting ss 5K and 5L, and that rationale must inform the construction of ss 5K and 5L. Unless regard is had to the particular circumstances of each individual case, and this includes segmenting (where that is reasonably possible) the particular activities actually engaged in from the broader (and more general) activity of which it forms part, the rationale may often not be achieved. In my view, segmenting in this way would reasonably be possible where persons are engaged in a recreational activity that comprises sets of activities that, according to commonsense considerations, are distinguishable and separate from each other.

47 I would add this further consideration, which supports the conclusion that regard must be had to the particular activities engaged in by the plaintiff at the relevant time. Any other test for determining the scope of the relevant dangerous recreational activity is likely to be vague and uncertain (if another test is capable of formulation at all). It is, in my view, not possible satisfactorily to define with any reasonable certainty, a line between the ordinarily used and general description of a particular recreational activity (encompassing the risks ordinarily attendant upon that activity), and a description that is qualified so as to limit that degree of generality - but not so qualified to the degree constituted by a description of the line as being

merely the “particular activities engaged in by the plaintiff at the relevant time”. It is not possible, in my view, to provide a bright line distinction somewhere between the everyday general description of a recreational activity and the “particular activities engaged in by the plaintiff at the relevant time”. It is not even possible to suggest a faint and dull line, smudged only in parts. And, in any event, any other line of demarcation (not based on the particular activities of the plaintiff) is not likely to take into account any risks created by the conduct of the plaintiff that would not ordinarily be part of the general activity.

48 For example, if it is accepted that “walking” is too general a description, where does one draw the line between that general description and a description that would allow one or more of the following factors to be taken into account: the place of the walk, the state of the traffic anticipated and experienced, the condition of the path, the actual weather, the weather that was expected, the visibility, the age of the walker, the mental competence of the walker, the walker’s physical competence, the walker’s experience, the walker’s sobriety, the walker’s knowledge or ignorance of any dangerous circumstances in the path which would be regarded as traps, the walker’s clothing and equipment, whether the walker was alone or with companions, the age, competence, experience and sobriety of the companions. The list of factors that could bear on the risk involved in this simple common or garden recreational activity is infinite in number. How can one differentiate in a principled way between them? In my opinion, this question cannot be answered in a satisfactory way. All must be taken into account.

49 If no practicable test for determining the scope of the activities exists, other than “the particular activities engaged in by the plaintiff at the relevant time”, it is self-evident that the test so articulated must be regarded as the test intended. Otherwise uncertainty and confusion would be the result. No other test has been suggested.

50 Accordingly, in my view, the dangerousness (in terms of s 5L) of the recreational activity is to be determined by the activities engaged in by the plaintiff at the relevant time. All relevant circumstances that may bear on whether those activities were dangerous in the defined sense include relevant matters personal to the plaintiff and others of the kind I have mentioned.

The distinction between negligence and gross negligence

51 In cases where the obvious risk is of being harmed by the conduct of a person (and not by physical features of the locale or other natural phenomena), for s 5L to become relevant the obvious risk must at least be of negligent conduct. Without negligence there could be no cause of action and no liability. Section 5L therefore may involve a plaintiff in certain circumstances having to accept the risk of another person being negligent. This is consistent with the rationale of the legislation, to which I have previously referred.

52 Negligence comes in an infinite number of forms and the degrees of negligent conduct are infinite. The term “gross negligence” is nowadays not often used but courts from time to time still consider its meaning and application: see for example ***R v De’Zilwa [2002] VSCA 158;*** (2002) 5 VR 408, ***R v Leusenkamp*** (2003) 40 MVR 108, ***Etna v Arif*** [1999] VR 353 at 383, ***Re Bendeich (No 2)*** (1994) 53 FCR 422 at 427. It is sufficient, for the purposes of these reasons, to say that gross negligence is negligence to an extreme degree.

53 It goes without saying that in certain circumstances the risk of a person being negligent (and causing harm) might be obvious, but in the same circumstances the risk of a person being grossly negligent (and causing harm) might not be obvious. I think it also goes without saying that while a person might accept the risk of harm caused by another's negligent conduct, that person is less likely to accept the risk of a person being grossly negligent.

54 In my view, when considering whether there has been a materialisation of an obvious risk, a distinction may have to be drawn between a risk of negligent conduct on the part of another and conduct that is grossly negligent. In some circumstances, it may not be sufficient merely to ask whether the risk of harm caused by a person being negligent was obvious. If the conduct that caused the risk amounted to gross negligence, it would be necessary, in my opinion, to determine whether the risk of harm caused by gross negligence of the kind in question was obvious. Otherwise, if – for the purposes of s 5L – the "risk of negligence" is to be regarded as a descriptive catch-all for the risks of any kind of careless conduct, no matter how extreme, harm caused by grossly negligent conduct could be held to be an obvious risk where in fact such a risk was not obvious at all.

55 I would add that the question is not whether it was obvious that there was a risk that the very facts that did in fact materialise could materialise. Rather, it is whether there was an obvious risk that that kind of thing might materialise. That is consistent with the approach generally applicable to elements of the common law tort of negligence that in some respects are analogous.

The circumstances relating to the shooting

56 I now turn to the facts of the particular case.

57 Mr Mourlas arranged to spend a weekend with a group of men at a country property known as "Lockherme" near Bathurst. The men planned to engage in various outdoor activities including "spotlighting" (that is, shooting kangaroos at night with the aid of a spotlight). Amongst the participants in this outing was Mr Fallas.

58 The men (who all lived in Sydney) rendezvoused at their destination at about 6.00 pm. They proceeded to do some shooting in which Mr Mourlas participated. Later, they returned and went to a nearby hotel. They had a "bit to eat" and "a few drinks". Mr Mourlas had "one or two light beers" and Mr Fallas had a "couple of beers". The men spent about an hour to an hour and half in the hotel and returned to the property at about 10.00 pm. They decided to do some more shooting and this occurred about half an hour later.

59 Mr Mourlas helped Mr Fallas load the guns in the vehicle. Mr Fallas climbed into the driver's seat and Mr Mourlas sat in the passenger's seat next to him. Two other men, Jimmy Fallas and Steven Tzimogiannis, sat in the rear. Mr Mourlas agreed to hold the spotlight in the vehicle while the other men shot.

60 The vehicle drove for about 5 to 10 minutes into the bush and then stopped. Mr Mourlas activated the spotlight in the vehicle. Jimmy Fallas and Steven Tzimogiannis got out and began walking in front while the vehicle followed them. Mr Mourlas shone the spotlight ahead.

61 At some stage the vehicle became stationary. Mr Fallas said, “These guys don’t know how to shoot” and climbed out of the vehicle with a handgun. By this time some kangaroos had been illuminated in the spotlight. Mr Fallas joined the other two men in front of the vehicle and fired some shots. Mr Mourlas continued operating the spotlight in the vehicle.

62 Mr Fallas returned to the vehicle with the handgun in his right hand. As he came towards the driver’s side of the vehicle, Mr Mourlas said to him:

“Make sure there’s no bullets in there”.

Mr Fallas replied:

“There’s nothing, it’s alright, it’s alright”.

63 Mr Mourlas told him to “make sure it was safe” and told him not to come in to the vehicle with a loaded gun. Mr Fallas repeated:

“It’s alright, it’s nothing, it’s all safe, it’s safe”.

64 Mr Fallas entered the vehicle on the driver’s side and sat with his gun in his right hand pointed downwards “towards his side”. Mr Mourlas told Mr Fallas to take the gun outside. Mr Mourlas said:

“Don’t bring it in the car, don’t do that in the car”.

and:

“Point it outside in the grass, you don’t known what can happen”.

Mr Fallas replied:

“It’s alright, there’s nothing there. It’s alright, I know what I am doing, I’ve got a licence. I know what I am doing.”

65 Mr Mourlas continued with his spotlighting exercise and began looking at Steven Tzimogiannis and Jimmy Fallas. He turned his head to the left to do this. He saw out of the corner of his eye that Mr Fallas was “playing with the gun”. Mr Fallas was “clocking it back and forward”. Mr Fallas said that the gun was jammed. As Mr Fallas was doing this he pointed the gun towards Mr Mourlas’ direction. Mr Mourlas said to him:

“Do it outside”.

66 Mr Mourlas then turned his head to the left “to see what the other boys were doing out there”. He thereupon heard a shot go off in the car and felt a burning sensation in his right leg. He said to Mr Fallas:

“You shot me, you shot me”.

Mr Fallas replied:

I didn't mean to I'm sorry".

The parties' contentions and the judge's findings

67 Mr Fallas contended at trial that the activity that Mr Mourlas engaged in was "shooting at night" which he submitted was a dangerous activity within the definition.

68 Mr Fallas submitted that the alcohol the participants were drinking contributed to the dangerousness of the activity. Her Honour found, however, that, while alcohol had been imbibed during the evening, the persons involved had not drank too excess. This finding was not challenged.

69 Mr Mourlas did not dispute that he was engaged in a recreational activity, but did dispute that the activity in which he was engaged was a dangerous one. He submitted to her Honour that the activity in which he was engaged should be categorised as sitting in the vehicle and manipulating the spotlight. In the alternative, he submitted that, when conducted with care and caution, shooting kangaroos by shotlight does not involve a significant risk of physical harm.

70 The judge held:

"... given that [Mr Mourlas] was not participating in the actual shooting, but was seated in a vehicle, I am not persuaded that the recreational activity in which he was engaged was necessarily dangerous or that it involved a significant risk of physical harm".

71 When dealing with the question of obvious risk, her Honour held:

"[Mr Mourlas] was asked by [Mr Fallas] to accompany him for the purpose of manipulating or holding a spotlight so that others might shoot. If he had been shot whilst participating in the actual shooting, in the dark, in unknown territory and taking into account his inexperience, the risk of injury may well have been an obvious one.

However, in the circumstances of this case, I do not think it would have been obvious to a reasonable person in [Mr Mourlas's] circumstances that he ran the risk of being shot whilst sitting in the vehicle, holding the spotlight.

For those reasons I find, even if the activity was a dangerous recreational activity (and I am not persuaded that it was), that [Mr Mourlas] did not suffer harm as a result of the materialisation of an obvious risk of a dangerous recreational activity."

72 Mr Fallas challenged these findings.

Was Mr Mourlas engaged in a dangerous recreational activity and was there a materialisation of an obvious risk?

73 In my view, statistics relating to injury by gunshot would not be of much help in this case, nor would the statistics relating to accidental shootings on hunting expeditions. The unique circumstances render such statistics largely irrelevant. I agree with Basten JA that whether the group of men involved in the outing were competent, experienced, fresh or tired, sober or

inebriated, and whether they were otherwise known to be careful and responsible, would be relevant to the issues that call for decision.

74 Senior counsel for Mr Fallas submitted to this Court that the activity engaged in by Mr Mourlas should be defined as "spotlighting" (that is hunting and shooting kangaroos at night with the aid of a spotlight). He repeated the submission that had been made on behalf of Mr Fallas at trial, namely, that the significant risk was that of being accidentally shot while spotlighting.

75 In my opinion, the activity that Mr Mourlas was engaged in was sitting in the vehicle, holding the spotlight for the shooters outside, on the basis that at various times one or more of the shooters might leave or enter the vehicle with firearms that might or might not be loaded. In my view that limited activity is distinguishable and separate from the other activities which fall under the general description of "shooting kangaroos by spotlight". The question, therefore, is whether there was a significant risk of physical harm in engaging in that particular limited activity.

76 The risks attendant on shooting kangaroos must depend on the circumstances. For example, if skilled and experienced hunters undertake the shooting, the risks might be relatively low. If the hunters are novices, the converse might be the case.

77 Mr Mourlas had no previous experience in shooting kangaroos. Mr Fallas told Mr Mourlas that he was the only one amongst the men who was a "licensed shooter". From the tenor of the evidence, generally, it seems that the men were not experienced at shooting. They were not country people for whom shooting kangaroos by spotlight might have been a familiar pastime.

78 The accident occurred at about 10.30 pm after the men, or some of them, had driven for some hours, had dinner, and some alcohol to drink. There would have been a measure of excitement from the shooting itself. Their alertness and ability to concentrate could not have been at an optimum level.

79 In my view, in these circumstances, there was a significant risk that one or other of the men, while leaving or entering or being in the vehicle as Mr Mourlas was operating the spotlight, might handle a loaded firearm in a negligent manner and cause someone in the vehicle to be shot. In other words, I am of the opinion that the recreational activity in which Mr Mourlas was engaged carried with it a significant risk of physical harm and, therefore, was a dangerous recreational activity within the meaning of s 5K.

80 I would answer the question whether Mr Mourlas was injured by the materialisation of an obvious risk in the negative.

81 Mr Mourlas asked Mr Fallas to make sure that there were bullets in the gun but Mr Fallas merely reassured him that the gun was not loaded. Mr Falls later repeated that reassurance. Mr Mourlas told Mr Fallas more than once to "make sure it was safe". Mr Fallas did not take appropriate steps in this regard. Mr Mourlas told Mr Fallas not to come in to the vehicle with a loaded gun. Mr Fallas nevertheless did so. When he entered the vehicle, Mr Mourlas told Mr Fallas to take the gun outside. Mr Fallas did not. When he started to fiddle with the gun, Mr Mourlas told him to stop and to take the gun outside. Mr Fallas again did not comply. Mr Mourlas told him to "point it outside in the grass". Mr Fallas did not. This conduct comprised

groundless reassurances and persistent failures to take steps to ensure that there would be no accident caused by the firearm, all in the face of earnest requests to be careful. The eventual shooting of the firearm was, in my view, gross negligence on the part of Mr Fallas.

82 Mr Fallas's replies to Mr Mourlas's questions, and his actions, had the effect of reassuring Mr Mourlas so that – in my view - there was no obvious risk to Mr Mourlas of being shot. This led to Mr Mourlas remaining in the vehicle and, immediately prior to being shot, looking to the left towards the other two men and away from Mr Fallas and the firearm.

83 In the circumstances, the correct question is whether in the particular circumstances the risk of Mr Mourlas being harmed by conduct as extreme as that of Mr Fallas (amounting to gross negligence) was obvious within the meaning of an obvious risk as defined by s 5K. I would answer this question in the negative.

Conclusion

84 I would dismiss the appeal with costs.

85 **TOBIAS JA**: I have had the benefit of reading in draft the judgments of Ipp JA and Basten JA. Although both agree that the appeal should be dismissed, they do so for different reasons.

86 Basten JA has concluded (at [149]) that the appellant failed to establish that there was a significant risk of injury occurring from the accidental discharge of a firearm whilst kangaroo shooting at night in the circumstances in which he was involved. In other words, his Honour has held that the appellant did not prove that the respondent was engaged in a "*dangerous recreational activity*" within the meaning of that expression as defined in s5K of the *Civil Liability Act* 2002 (the Act) at the time he suffered harm by being shot in the leg. His reasons for this conclusion are to be found in [141] of his judgment.

87 Essentially, his Honour has distinguished between two elements of the activity of kangaroo shooting at night both of which must occur with sufficient frequency before there would be a significant risk of one participant (the plaintiff) being shot by another (the defendant) in the course of that activity.

88 The first is that there must be an accidental discharge of the gun by the defendant. His Honour considered that such an occurrence might be assumed to happen with sufficient frequency as to constitute a significant risk during night hunting. The second is that the gun must at the time of discharge, and whether by accident or negligence on the part of the defendant, have been pointed in the direction of the plaintiff. His Honour was not prepared to assume, in the absence of evidence, that this second element had been proved not to be too remote to constitute a significant risk.

89 It is true that his Honour accepted (at [143]) that the risk needed to be assessed according to the incompetence or carelessness of the particular participants. By this I understand him to be distinguishing in the present context between a hunting party of professional kangaroo shooters on the one hand and one comprised of inexperienced amateurs out for a "*good time*"

on the other. The risk of physical harm arising from the hunting activities of the former may indeed be regarded as not being significant.

90 But the participants in the present case fall within the second category. If, as I believe to be the case, the word "*significant*" in the context of the subject definition means a risk which is not merely trivial but, generally speaking, one which has a real chance of materialising, then the subject activity was clearly capable of involving a significant risk of physical harm. This is consistent with the third approach referred to by Basten JA in [144] of his judgment and which I would respectfully adopt as the correct approach to a case of the present kind. On this approach, given the factors referred to below, there can be no relevant difference in terms of each having a significant risk of materialising between the first and second elements referred to in [88] above.

91 I am conscious of the observations of Ipp JA in [18] of his judgment that "*significant*" means a standard somewhere between a trivial risk and a risk likely to materialise. A real chance of the risk materialising lies somewhere between these two standards although probably closer to the second than the first. I accept that there is merit in not seeking to define the term with precision, as its application requires a normative judgment in light of the particular facts and circumstances of each case. However, I see no danger in adopting as no more than a general guide that the risk should have a real chance of materialising for it to qualify as significant. But I emphasise that such a standard, which as I have said lies between the extremes articulated by Ipp JA, is to be regarded as what it is - no more than a general guide.

92 It will thus be appreciated that I prefer the approach of Ipp JA that, for the purposes of the definition of "*dangerous recreational activity*" in s5K, the scope of the relevant activity must be determined by reference to the particular activities engaged in by the respondent at the relevant time being the period immediately prior to the respondent suffering the relevant harm as a consequence of the appellant's negligence. In other words, as his Honour notes at [43], [46] and [47] of his judgment, in determining whether the relevant recreational activity involves a significant risk of physical harm, one must identify that activity at a relatively detailed level of abstraction by including not only the particular conduct actually engaged in by the respondent but also the circumstances which provide the context in which that conduct occurs

93 In the present matter, those circumstances included the following (also identified by Ipp JA in [76] to [78] of his judgment):

· That the hunting activities took place at night in a bushland setting with which the participants were not apparently familiar;

· That the participants were not professional kangaroo hunters but were amateurs pursuing the activity just for the fun of it;

· That as far as the evidence goes, and perhaps apart from the appellant who held some form of licence, the other participants were not familiar with or experienced in the use and operation of firearms;

· That the activity occurred at approximately 10.30pm after the participants, or at least some of them, had driven for a number of hours and, although they had eaten, some had consumed alcohol;

· That given that the participants were pursing the activity for fun in the sense that they were simply out for a good time, it is reasonable to infer that there was a measure of excitement and possibly bravado in the manner in which they went about it.

94 Further, as Ipp JA recognises in [75] and [79] of his judgment, the relevant activity involved more than just the exploits of the participants outside the motor vehicle from which the respondent was spotlighting. It included the fact that at some point the shooters would return to the confines of the vehicle with their firearms in circumstances where they might well have been hyped up by their activities, whether successful or not, and would have attempted to store or otherwise handle their firearms in the vehicle in circumstances where, with or without their knowledge, they may or may not have been loaded.

95 Accordingly, when looked at in the context of the recreational activity in which the respondent was engaged at and before the time he was shot, it was one which clearly involved a significant risk of physical harm. That risk included the negligent discharge of a loaded firearm whether outside the vehicle during the course of the actual shooting activities or within the vehicle when those activities were concluded and the participants re-entered the vehicle with their firearms. In the confined space of the subject vehicle it seems to me that common sense dictates that the risk of a firearm discharging causing physical harm to the respondent was one which, as described by Ipp JA in [18] of his judgment, lay somewhere between a trivial risk and one likely to materialise. Given the circumstances to which I have referred, in my opinion the risk lay closer to the latter rather than the former.

96 Like Ipp JA, I am of the opinion that the totality of the circumstances surrounding the activity in which the respondent was engaged constituted a recipe for disaster in which the risk of a firearm at some point being accidentally or negligently discharged and one of the participants being shot as a consequence had a clearly significant chance of materialising. I am accordingly led inevitably to the conclusion that the subject activity was one which involved a significant risk of physical harm and was thus a "*dangerous recreational activity*" within the meaning of the definition of that expression in s5K of the Act.

97 Although each case will obviously depend upon its own particular facts and circumstances, the principle which in my view the present case establishes is that in determining whether a particular recreational activity falls within the definition in s5K, it is inappropriate to adopt a theoretical or general level of abstraction when characterising the relevant activity. On the contrary, given that the relevance of the definition is to be determined in the context of s5L(1), it is necessary to take into account all the objective circumstances which prevailed prior to the plaintiff suffering the relevant harm.

98 The issue as to whether the harm suffered by the respondent was the result of the materialisation of an "*obvious risk*", I find more difficult to resolve. It is clear from the definition of "*obvious risk*" in s5F that one is required to have regard to the particular circumstances in which the respondent suffered the relevant harm and determine whether the risk which resulted in his suffering that harm would have been obvious to a reasonable person in his position. In other words, as with the case of determining whether the activity in which the respondent was engaged was a "*dangerous recreational activity*" as defined, all of the

surrounding circumstances which occurred immediately prior to the respondent's suffering the relevant harm must also be identified for the purpose of determining whether the risk which materialised was "*obvious*".

99 I do not detect any difference in principle between the approach of Ipp JA and Basten JA to the determination of this question insofar as both conclude that, for the purpose of determining whether the risk which materialised was obvious, the nature of the risk should be identified by reference to the particular circumstances prevalent at the time the respondent was shot. As will be apparent, I agree with that approach.

100 It is to be noted that there is no definition of the word "*obvious*" in s5F. In *Wyong Shire Council v Vairy*; *Mulligan v Coffs Harbour City Council* [2004] NSWCA 247 at [161], I defined the word as follows:

" 'Obvious' means that both the condition and the risk are apparent to and would be recognised by a reasonable man, in the position of the [plaintiff], exercising ordinary perception, intelligence and judgment."

101 In [162] of the same judgment I noted that in this definition the word "*condition*" referred to the factual scenario facing the plaintiff. In the context of the present case, the factual scenario facing the respondent included the factors to which I have already referred when dealing with the issue of "*dangerous recreational activity*" such as inexperienced shooters at night in unfamiliar bushland in circumstances where they were likely to have been excited or excitable depending on the success or otherwise of their endeavour when re-entering the motor vehicle with firearms which may still have been loaded but of which fact they may have been unaware. The risk of a firearm being discharged in these circumstances would be obvious if, in the context of the case, it would have been apparent to or recognised by a reasonable person in the respondent's position that the conduct of the appellant on re-entering the vehicle with his pistol (which may or may not have been loaded to his knowledge) carried with it the risk of the gun being discharged causing serious harm.

102 Thus Basten JA has expressed the view that the circumstances of the present case, where the appellant re-entered the vehicle with his pistol, involved a risk that there was a bullet in the pistol prior to its discharge even though the appellant assured the respondent that there was not. In this regard, the fact that the respondent was unable to observe that the pistol was loaded was not fatal to the risk being obvious: see s5F(4). Although the respondent was at pains to obtain an assurance from the appellant that the pistol was not loaded or had been unloaded before the appellant re-entered in the vehicle, and that it was not pointed towards the respondent at the time the appellant was checking or manipulating it, nevertheless Basten JA has held that these factors did not militate against the risk of the pistol being discharged as obvious.

103 On the other hand, Ipp JA has come to the opposite view upon the basis (see [81] and [82]) that the risk materialised as a consequence of the gross negligence of the appellant in circumstances where he had failed to comply with the respondent's numerous requests not to enter the vehicle with a loaded pistol, to take it outside and, when the appellant commenced to "clock" the pistol backwards and forwards, to stop doing so, to take it outside and to point it away from the respondent.

104 As the evidence extracted by Ipp JA in [62] to [64] of his judgment illustrates, the appellant provided a number of assurances to the respondent that the pistol was safe and that he knew what he was doing, all of which turned out to be wrong. According to his Honour the appellant's conduct amounted to gross negligence which raised the question whether the risk of the appellant being grossly negligent constituted an obvious risk as defined. His Honour considered that it did not.

105 Accepting that in the circumstances the conduct of the appellant constituted gross negligence by virtue of his consistent failure to comply with the reasonable and responsible requests of the respondent on the one hand and the giving of false assurances to the respondent that all was well and that the safeguards sought by the respondent were unnecessary on the other, the question which requires a response is whether the risk that the appellant's assurances would be without foundation were apparent to, and would be recognised by, a reasonable person in the respondent's position exercising ordinary perception, intelligence and judgment.

106 In other words, in my view the risk of the pistol being discharged in light of the appellant's assurances would only be obvious in the relevant sense if a reasonable person in the respondent's position had some justifiable reason to regard the appellant's assurances that the pistol was unloaded and safe as unreliable. With some hesitation it seems to me on the evidence that the assurances would be so regarded.

107 As Ipp JA points out in [81] of his judgment, the conduct of the appellant "*comprised a litany of groundless reassurances coupled with persistent failure to take steps to ensure that there would be no accident caused by the gun.*" A reasonable person in the respondent's position should be taken on the probabilities to have been aware that the appellant's reassurances were unreliable given his continued conduct in fiddling with his pistol, which he had already indicated was jammed, within the confines of the vehicle. Such conduct, coupled with the requirement for the respondent to more than once entreat the appellant to "*make sure it [the gun] was safe*", would give rise to a risk which would be recognised by a reasonable person in the respondent's position that the pistol might still be loaded and thus might accidentally be discharged which, if it was pointed towards the respondent, would cause him injury. In my opinion, therefore, that risk was obvious within the meaning of the definition of that expression in s5F.

108 It may well be that in some cases a risk which materialises as a consequence of the gross negligence of a defendant may not be obvious in the relevant sense as Ipp JA recognises in [54] of his judgment. However, in the particular circumstances of the present case, and accepting that the appellant's conduct was grossly negligent, the risk of harm materialising from that conduct would have been apparent to and recognised by a reasonable person in the position of the respondent as likely to result in the pistol being discharged.

109 It follows from the foregoing that in my opinion the appellant has satisfied the requirements of s5L(1) as a consequence whereof he is not liable in negligence for the injuries which the respondent sustained due to his negligence. In these circumstances I would propose the following orders:

(a) Appeal allowed.

(b) Set aside the verdict and judgment of her Honour Judge Quirk of 24 August 2005 in favour of the respondent and in lieu thereof enter a verdict and judgment in favour of the appellant.

(c) Order that the respondent pay the appellant's costs of the proceedings in the District Court and of the appeal but to have with respect to the latter a certificate under the *Suitor's Fund Act* 1951, if otherwise qualified.

110 **BASTEN JA:** The Claimant in the present proceedings was the defendant in the proceedings below and it is convenient to continue to refer to him as "the defendant". The Opponent in this Court was the plaintiff in the Court below and, again, it is convenient to refer to him as "the plaintiff".

Background

111 The plaintiff was shot in the leg as a result of an accidental discharge of a handgun by the defendant. The circumstances in which the accident occurred are sufficiently described in the judgment of Ipp JA and need not be repeated. The defendant's case at trial was that the plaintiff shot himself in the leg. The trial judge rejected his evidence and accepted the evidence of the plaintiff, to the effect that the injury was caused by the discharge of the handgun by the defendant, whilst it was pointing at the plaintiff's leg.

112 It appears that the handgun had jammed when the defendant was using it to shoot at kangaroo. He appears to have believed, apparently wrongly, that he had discharged the contents of the magazine. The plaintiff, according to his oral evidence, was continuing to direct the spotlight from the passenger side of the car and was not looking directly at the defendant when he got back into the car. Nevertheless he gave evidence that the defendant "sat pointing the gun towards the driver's section towards the front of him". He was aware that the defendant was seeking to un-jam the gun, using an action which he described as "clocking it back and forward". He noticed the defendant pointing the gun towards the passenger side of the floor. The gun then discharged and he felt the pain of the shot in his right leg.

113 One might infer that the defendant, as a person in control of a handgun, was held to owe a duty of care to those in his proximity, in the manner in which he handled the gun. One may also infer that it was held to be a breach of that duty to allow the barrel of the gun to point towards another person, in circumstances where the gun had apparently jammed and the defendant was seeking to un-jam it. In those circumstances, there was a foreseeable risk that there might be a bullet in the gun and that it might discharge whilst being manipulated by the defendant.

114 On the basis that the plaintiff's version of the events was accepted, there appears to have been no dispute as to the liability of the defendant in negligence, if the matter were to be determined under the general law. That may be inferred from the fact that her Honour did not consider it necessary to identify in express terms the nature of the duty owed by the defendant to the plaintiff, the foreseeability of the risk of injury, nor the conduct which constituted a

breach of that duty. Rather, the dispute centred on the application of s 5L of the *Civil Liability Act* 2002 (NSW) ("the Act"). Section 5L provides a defence to a claim "in negligence" which, if made out, will mean that the defendant is "not liable". In this section, the use of the preposition "in", rather than "for", suggests that the phrase "not liable in negligence" should be understood to refer to the tort of negligence and not merely a factual assertion of a "failure to exercise reasonable care and skill", which is the definition of "negligence" in s 5 of the Act.

115 It may be possible to dismiss a claim on the basis that s 5L applies, in which case the elements of the tort might not need to be identified in the usual way. However, where the section is found not to apply, the usual findings will need to be made, preferably in express terms.

Issues

116 The application of s 5L required the Court to address a number of interrelated questions, which may be identified as follows:

(1) In considering the factual elements of s 5L, which party bore the burden of proof?

(2) What was the "activity" in which the plaintiff was "engaged", when he suffered harm?

(3) Was the activity a "recreational activity", as defined in s 5K?

(4) If yes, was the activity a "dangerous recreational activity", being one that involved a "significant risk of physical harm"?

(5) Was the risk an "obvious risk", as defined in s 5F?

(6) If yes to (4), did the plaintiff's harm flow from a risk "of" that activity?

Before addressing these questions, it is convenient to address the correct approach to the construction of the provisions in the Act.

Principles of construction

117 In considering the meaning of the statutory terms, the Opponent (plaintiff) impressed upon the Court the principle of statutory construction identified in *Coco v The Queen [1994] HCA 15;* (1994) 179 CLR 427. That case involved the power of a police officer to execute an authority granted under the *Invasion of Privacy Act* 1971 (Qld) to place a listening device on private premises. The section did not in terms authorise an officer to enter and remain on private property. In the joint judgment of Mason CJ, Brennan, Gaudron and McHugh JJ, the following principle is stated at 435-436:

"Every unauthorised entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right. In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorised or excused by law. Statutory authority to engage in what otherwise would be

tortious conduct must be clearly expressed in unmistakeable and unambiguous language. Indeed, it has been said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorise what would otherwise have been tortious conduct. But the presumption is rebuttable and will be displaced if there is a clear implication that authority to enter or remain upon private property was intended. Such an implication may be made, in some circumstances, if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless."

118 The strength of the presumption so identified has more recently been doubted by one member of the joint judgment in *Coco*, namely McHugh J, in *Malika Holdings v Streeton [2001] HCA 14;* (2001) 204 CLR 290 at [28]. His Honour stated:

"But times change. What is fundamental in one age or place may not be regarded as fundamental in another age or place. When community values are undergoing radical change and few principles or rights are immune from legislative amendment or abolition, as is the case in Australia today, few principles or rights can claim to be so fundamental that it is unlikely that the legislature would want to change them."

119 His Honour then noted that there were undoubtedly fundamental principles to which the presumption would apply. He then continued:

"But care needs to be taken in declaring a principle to be fundamental. Furthermore, infringement of rights and departures from the general system of law are in a different category from fundamental principles. Some rights may be the corollaries of fundamental principles. In that sense, they are fundamental rights which are presumed to continue unless the legislative language is clear and unambiguous. But nearly every session of Parliament produces laws which infringe the existing rights of individuals. Given the frequency with which legislatures now amend or abolish rights or depart from the general system of law, it is difficult to accept that it is 'in the last degree improbable' that a legislature would intend to alter rights or depart from the general system of law unless it did so 'with irresistible clearness'."

120 The statement of principle upon which his Honour was commenting was perhaps a more inflexible statement than that in *Coco*, being from an earlier age, in *Potter v Minahan [1908] HCA 63;* (1908) 7 CLR 277 at 304 (O'Connor J). McHugh J concluded at [30]:

"Speaking generally, a much surer guide to legislative intention in areas of legislation dealing with ordinary rights or the general system of law is to construe the language of the enactment in its natural and ordinary meaning, having regard to its context – which will include other provisions of the enactment, its history and the state of the law – as well as the purpose which the enactment seeks to achieve."

121 No doubt this admonition must be applied with care, accepting that there are fundamental legal principles which may in some cases be constitutionally protected, at least at the federal level, and which in other cases no court would assume were interfered with absent a clear indication, express or implied, to that effect: see, eg, *Al-Kateb v Godwin [2004] HCA 37;* (2004) 219 CLR 562 at [19] (Gleeson CJ). On the other hand, the express purpose of the Act is to limit the recovery of damages in relation to negligence and it must be given effect in accordance with that purpose: see *Interpretation Act* 1987 (NSW), s 33. Thus, questions of

presumption may be put to one side and the ordinary and natural reading of the statutory terminology considered.

Burden of proof

122 The defendant argued that s 5L conferred a statutory immunity which the plaintiff was required to negative if he were to succeed in his action. However, I do not think that to describe it as conferring a statutory immunity is inconsistent with characterising it as a defence. The elements of the defence are relied on by the defendant to establish its immunity from liability: accordingly, the principle that he or she who "substantially affirms an issue must prove it" operates: see *Williamson v Ah On [(1926) HCA 46;* (1926) 39 CLR 95 at 113 (Isaacs J).

123 Under general law principles, voluntary assumption of risk constituted a defence, for which a defendant needed to establish as a fact that "the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, implied agreed to incur it": see *Letang v Ottawa Electric Ry Co* [1926] AC 725 at 731 (PC). This defence must be distinguished from the situation where the nature of the recreational activity may reduce the standard of care owed by participants to each other: see, eg, *Rootes v Shelton [(1967) HCA 39;* (1967) 116 CLR 383 at 389 (Kitto J). Rather, s 5L assumes there would otherwise be liability for negligence, and provides an immunity. The provision differs from the general law principle of voluntary assumption of risk because it does not require that the plaintiff had knowledge and appreciation of the risk which was accepted: see *Scanlon v American Cigarette Company (Overseas) Pty Ltd (No. 3)* [1987] VR 289 (Nicholson J). Nevertheless, the similarity with respect to underlying principle and form support the conclusion that the burden is on the defendant to establish the defence, as with the general law defence: see *Roggenkamp v Bennett [(1950) HCA 23;* (1950) 80 CLR 292 at 300 (McTiernan and Williams JJ). Consistently with that approach, it was the defendant in the present case who pleaded reliance on Part 1A of the Act. Accordingly, he bore the burden of proof with respect to the necessary factual elements.

The "activity"

124 The trial judge identified the activity by reference to the conduct of the plaintiff. That approach was correct. Section 5L refers to an activity "engaged in" by the person injured.

125 The first complaint made by the defendant was in relation to her Honour's finding that the plaintiff was not engaged in a dangerous recreational activity. Her Honour held (Judgment, p 30):

"In respect of whether or not the plaintiff was participating in a dangerous recreational activity, given that he was not participating in the actual shooting, but was seated in a vehicle, I am not persuaded that the recreational activity in which he was engaged was necessarily dangerous or that it involved a significant risk of physical harm."

126 Although stated disjunctively, the passage should be understood as holding that the activity in which the plaintiff was engaged did not come within the statutory definition in s 5K of "dangerous recreational activity", an issue discussed below. In reaching this conclusion, her Honour noted two submissions by the plaintiff in the following terms:

"It is submitted for the plaintiff that 'dangerous recreational activit[y]' is intended to mean inherently dangerous sports, such as rugby league and union, bungee jumping and parachuting, which involve a real and unavoidable risk of injury, in contrast to a shooting trip such as this, where the risks of injury are invariably avoidable.

It is further submitted for the plaintiff that if the defendant's interpretation of dangerous recreational activity is correct, then even driving a motor vehicle could be said to involve a significant risk of physical harm."

127 There may be cases in which it is necessary to determine whether the plaintiff and the defendant are "engaged in" the same activity. For example, if the drivers of two cars decide to race on a suburban street and an accident occurs, there may, in particular circumstances, be a question as to whether a passenger who had not expected such conduct, and had no practical opportunity to avoid it, "engaged in" the activity.

128 However, in the present case, once the activity was identified as shooting kangaroo at night, and the relevant risk was identified as a wound caused by accidental discharge from a firearm, I do not think it is possible to characterise a person who merely drives, or who merely holds a spotlight, as not involved in the activity, because they are not involved in the actual shooting. To the extent that her Honour sought to draw such a distinction, in my view her reasoning was in error. If the only significant risk of the activity, which resulted in it being a "dangerous recreational activity" were a self-inflicted gunshot wound, the proper characterisation might be different. However, her Honour did not so limit the risks, nor would such a limitation have been reasonable in the circumstances. Whatever the precise definition of the risks, they must have included gunshot wounds caused to another by accidental discharge or other mishandling of a firearm. It follows, in my view, that the plaintiff was engaged in the recreational activity of shooting kangaroo at night.

129 By taking too limited a view of the activity in question, her Honour did not address the next issue which was to identify the risks involved in shooting kangaroo at night, and whether they constituted significant risks. Both parties joined in inviting this Court to determine the questions left unanswered at trial, if this Court were satisfied that the approach of the trial judge was erroneous.

A "recreational activity"

130 There was no dispute that the plaintiff, and his friends, were engaged in a recreational activity, as defined in s 5K, on the evening in question. The nature of the activity in which the plaintiff was engaged has been identified at [128] above. The real issue was whether it fell within the statutory concept of a "dangerous recreational activity".

"Dangerous recreational activity"

131 Section 5K defines "dangerous recreational activity" as a recreational activity which involves "a significant risk of physical harm". The natural reading of this definition is that what must be significant is either the "risk" or the "risk of physical harm". I would not read the word "significant" as requiring a particular level of physical harm. Nor, adopting a purposive approach, is there any reason to suppose that the legislature sought to exclude liability for serious physical harm, but not for insignificant physical harm. In my view the preferable approach is to treat that which is to be assessed as a "risk of physical harm". That

will import a consideration of the seriousness of the harm which might occur. Thus, if, as in *Rogers v Whitaker* (discussed below) the harm is potentially catastrophic, a very low level of risk may be treated as "significant". On the other hand, where the harm is not serious at all, the risk may not be considered significant until it reaches a much higher level. This approach adequately reflects the concept of dangerousness, without imposing any separate and independent assessment of the seriousness of the harm feared: c.f. *Falvo v Australian Oztag Sports Association* [2006] NSWCA 17 at [28]. For present purposes, it is sufficient to note that the physical harm in question was that resulting from being shot. There is no doubt that this form of harm fell comfortably within the concept of physical harm used in the definition of "dangerous recreational activity".

132 The real issue is the scope of the term "significant risk". On one view the concept of a "significant risk" is similar to that of "a material risk" used in other contexts in tort law. Thus, in considering whether a doctor owed a patient a duty to inform her of a risk associated with an operation, the joint judgment in *Rogers v Whitaker [1992] HCA 58;* (1992) 175 CLR 479 at 490 stated:

"The law should recognise that a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it."

133 The risk in question in *Rogers* was one of sympathetic ophthalmia in relation to an operation on a damaged eye. As noted in the joint judgment at 482:

"Evidence at the trial was that this condition occurred once in approximately 14,000 such procedures, although there was also evidence that the chance of occurrence was slightly greater when, as here, there had been an earlier penetrating injury to the eye operated upon."

The risk was that the operation on the injured would not only be unsuccessful, but would result in blindness in the other (healthy) eye. In this case, the risk was treated as "significant" because, although slight in percentage terms, had potentially catastrophic consequences and the doctor, it was held, had been made aware of her acute apprehension in that regard.

134 In the circumstances of a risk of potentially devastating harm, it is tempting to say that even a chance as low as 1:10,000 could be "significant". However, there are reasons for caution in adopting the approach accepted in *Rogers* in the present case. Thus, the purpose of the test articulated in *Rogers* was to determine the scope of duty of a medical practitioner, in cases other than ones of emergency or necessity, to provide information relevant to the patient's choice to undergo an operation. The majority judgment stated at 489:

"In legal terms, the patient's consent to the treatment may be valid once he or she is informed in broad terms of the nature of the procedure which is intended. But the choice is, in reality, meaningless unless it is made on the basis of relevant information and advice."

135 Whether particular information is relevant or material depends either upon what would be expected of a reasonable person or was actually expected by the plaintiff, where the expectation was or should have been known to the practitioner. By contrast, in the present case, the existence of a "significant risk", in relation to a recreational activity, will deprive the

injured party of a right of action. The reasonable expectations of the plaintiff need not control the limits of the immunity.

136 In the present statutory context the phrase “significant risk” is one which requires an objective test, not dependent upon the expectations of a person in a particular relationship with another, whether it be a drunken friend or a medical advisor. In relation to the definition of “obvious risk”, s 5F(3) expressly provides that a risk may be obvious “even though it has a low probability of occurring”. No doubt a low probability may nevertheless involve a significant risk, if it is not so low as to be “insignificant”. As the joint judgment of Deane, Gaudron and McHugh JJ in *Malec v J C Hutton Pty Ltd* [1990] HCA 20; (1990) 169 CLR 638 at 643 stated, in relation to the assessment of damages for future or potential events:

“If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. The probability may be very high – 99.9% - or very low – 0.1%. But unless the chance is so low as to be regarded as speculative – say less than 1% - or so high as to be practically certain – say over 99% - the court will take that chance into account in assessing the damages.”

137 In a separate judgment, Brennan and Dawson JJ in *Malec* noted that there are dangers in seeking to express probabilities as a percentage in determining what is speculative, or fanciful, or, on the other hand, certain. The same may be said in relation to determining whether a particular risk is “significant”.

138 In the course of the hearing, the Claimant (the defendant in the Court below) drew attention to the following evidence given by the plaintiff in cross-examination:

Q. And you knew before you went that shooting was a dangerous activity?

A. Yes.

Q. The reason why it was dangerous is because shooting accidents occur from time to time and people are injured?

A. That’s correct.

There was a second paragraph to similar effect, but referring to the plaintiff’s awareness that “firearms are inherently dangerous” because “firearms can discharge accidentally and people can be injured”.

139 Nevertheless, the views of the plaintiff are not critical in this respect. Section 5L of the Act does not in terms reinstate common law principles relating to the voluntary assumption of risk. Those principles required a careful consideration of the relationship between the plaintiff and the defendant and the extent to which the plaintiff had, by his or her voluntary conduct, assumed a level of risk. The Act, in contrast, creates a defence (by way of immunity from liability) generally with respect to dangerous recreational activities. As s 5L(2) expressly states, the section applies “whether or not the plaintiff was aware of the risk”.

140 The fact that the plaintiff accepted that the risk of accidental injury existed, may mean that such a risk, very broadly defined, was “obvious”. It does not follow that any activity using a firearm thereby qualifies as a “dangerous recreational activity”. Some may have a

very low risk of persons injuring each other. It may be that clay pigeon shooting falls into that category. What is less clear is whether hunting kangaroo at night falls into a different risk category. Such an activity may colloquially be described as “risky”, especially if it is accompanied by undue consumption of alcohol. However, her Honour did not find that consumption of alcohol was a significant factor in the present events.

141 Common assumptions, in such circumstances, may form an inadequate basis for determining that a general law right to damages has been removed. The Court had no material before it to suggest how many shooting accidents occurred during kangaroo hunting at night in Australia in a year, or any other period of time. Assuming that the participants are not significantly affected by drugs or alcohol, it is difficult to infer that this recreational activity involved a significant risk of one participant being shot by another. What would be required for a shooting to occur would be not merely an accidental discharge of a gun, but the simultaneous pointing of the gun in the direction of another individual, whether accidentally or otherwise. Accidental discharges might perhaps be assumed to happen with a sufficient frequency to constitute a significant risk during night hunting: the additional possibility of the gun being pointed towards a member of the hunting party, or sufficiently close to allow an injury by ricochet, may be too remote to be significant.

142 The approach to determining “significant risk” was not dealt with in detail at the trial, but one aspect, identified by the trial judge in her summary of the plaintiff’s submissions set out at [126] above, was that some activities involved “inherent” risks. Thus, in motorcar racing or contact sports, the risk of injury caused by errors of judgment, which may be inevitable with human participants, may be significant. Other cases, such as use of firearms may fall into a different category. Modern small arms are highly accurate and do not explode, so that the only significant risks may arise from cases of incompetent or careless handling.

143 If that assessment be correct, it does not follow that activities involving firearms will not fall within s 5L; rather the risk would need to be assessed according to whether incompetence or carelessness on the part of the particular participants rises above the level of a fanciful suggestion and constitutes a significant risk. Which approach is correct may itself be a fact requiring evidence.

144 There are three ways of considering whether the risk of harm is significant. The first is to assume that any risk will be significant, because the results of it eventuating are likely to be catastrophic. The second is to look for statistics which might demonstrate whether accidental shootings on hunting expeditions occur with significant frequency, or whether they are so rare as to constitute an insignificant risk. The third approach is to look at the particular circumstances of the case and inquire whether the participants were competent and experienced users of firearms, whether they were fresh or tired, sober or inebriated and whether they were otherwise known to be careful and responsible people.

145 The first approach to hunting expeditions is to define them as inherently “dangerous” because injury by gunshot is potentially catastrophic. The factual assumption may well be justified: see for example, NSW Public Health Bulletin, Vol 10, No. 7, July 1999, Peters, Fitzsimmons and Nguyen “Firearm Injury and Death in NSW” at pp 74-79, which demonstrates that over five years between 1990 and 1994 almost one in two firearm accidents which resulted in death or hospitalisation, were fatal. It may be a similar thought process which led counsel for the plaintiff to identify bungee jumping and parachuting as dangerous recreational activities. But if the phrase “significant risk of physical harm” would not be

satisfied by a miniscule risk, even of very serious harm, this approach would not reflect the statutory test. It also casts doubt on the usefulness of the plaintiff's concession in cross-examination that use of firearms was a dangerous activity.

146 The second approach was not proposed in the present case. There was no evidence as to whether accidental shootings were sufficiently common to constitute a significant risk. There are statistics of a general kind which are available, and which demonstrate that death by "external causes" (identified as accidents, poisonings and violence) constituted some 6% of deaths registered in Australia in 2001; that firearms were a cause of death in only 4.2% of those cases or, 0.25% of total deaths, and that accidental deaths were only 5% of firearm related deaths (92% of which were suicides or homicides): see Australian Bureau of Statistics, Report No. 269, J. Mouzos and C. Rushforth "Firearm related deaths in Australia, 1991-2001". On those figures, only 0.013% of deaths registered in Australia in 2001 were attributed to accidents using firearms, the total figure being 18 deaths. If the proportion (albeit from a different period) noted above of an equal number of injuries requiring hospitalisation and fatalities result from firearm incidents, the total number of incidents, Australia-wide, in 2001, may have been in the order of 50 accidents. On one view, the risk of accidental shooting could thus be said to be insignificant. On the other hand, it may not be possible to assess whether the risk is significant or insignificant, without knowing how much hunting with firearms occurs in Australia (or perhaps New South Wales) and how often accidental injury occurs in the course of hunting. Whether such statistics are available was not discussed.

147 In *Woods v Multi-Sport Holdings Pty Ltd [2002] HCA 9;* (2002) 208 CLR 460, both McHugh J (in dissent) and Callinan J referred to statistics concerning the incidence of injuries and injury related conditions in the Australian population and the costs of accidents for the health system. McHugh J, at [63], considered it legitimate to refer to such statistics as "legislative" facts of which a court may take judicial notice and "use to define the scope or validity of a principle or rule of law". Callinan J, at [168] took a different view. His Honour commented:

"The number and severity of sports-related injuries and the cost of treating them throw no light upon the incidence of injury to a batsman from a ricocheting ball off his own bat in the course of an innings in an indoor cricket match. They are irrelevant to that matter. Even if they were relevant, they would still constitute evidence ... . The respondent has had no opportunity, here or elsewhere, of dealing with the surveys, either by leading evidence explaining them, distinguishing them or contradicting them, or by making submissions in any court about them or their relevance."

To these propositions, which are apposite in the present case, one must add that no such material was presented to this Court, whether by way of evidence or otherwise.

148 According to the third approach, the defendant would have been entitled to rely upon circumstances specific to this case, such as the inexperience or state of inebriation of the participants. There was some (albeit limited) evidence before the trial judge in respect of those matters. However, the defendant does not appear to have run his case on that basis, nor was the Court's attention directed to evidence which would allow the significance of the risk to be assessed in this manner.

149 Given the way in which the parties ran their case, both at trial and on appeal, and in particular the way in which the defendant ran his case, in my view he failed to establish that there was a significant risk of injury occurring from the accidental discharge of a firearm whilst shooting kangaroo at night, in the circumstances in which the plaintiff was involved.

Was the risk which materialised an "obvious risk"?

150 In addressing the question whether the risk which materialised was "an obvious risk" of the activity, her Honour posed the question in this form:

"Even it were the case that any participation, no matter how peripheral, in the activity of 'shooting at night', should be categorised as a dangerous recreational activity, there is the question to be considered of whether or not the prospect of being shot whilst sitting in the vehicle operating a spotlight was an 'obvious risk' within the meaning of s 5F of the *Civil Liability Act*."

Her Honour's conclusion (at p 33) was in the following terms:

"If he had been shot whilst participating in the actual shooting, in the dark, in unknown territory and taking into account his inexperience, the risk of injury may well have been an obvious one.

However, in the circumstances of this case, I do not think it would have been obvious to a reasonable person in the plaintiff's circumstances that he ran the risk of being shot whilst sitting in the vehicle, holding the spotlight."

151 It may well be that a particular recreational activity is attended by a number of significant risks of physical harm. For s 5L to be engaged, at least one of those risks must materialise and result in the harm suffered by the plaintiff. Further, that risk must be an "obvious risk" within the meaning of s 5F of the Act. These two elements must, to an extent, be treated together.

152 At a general level, the words of these provisions are simple and readily understandable. However, difficulties arise in their application to specific circumstances. Thus, in the present case, different results were said to arise, depending on the level of particularity with which the relevant risk was identified. Section 5L(1) directs attention to that risk which has materialised, causing harm to the plaintiff, which must be an obvious risk. Section 5F(1) identifies the qualities of an "obvious risk" as being a risk that "in the circumstances" would have been obvious to a reasonable person "in the position of" the plaintiff.

153 Thus, if the risk which is said to have materialised is simply that of harm flowing from the accidental discharge of a gun, whilst pointed at the plaintiff, that risk was undoubtedly obvious to the plaintiff himself, and would have been obvious to any reasonable person in his position. On the other hand, if one takes into account the assurances given by the defendant that the gun was not loaded at the relevant time, the risk may not be obvious. These differences suggest that the application of s 5L(1) will depend upon the level of particularity at which "the circumstances" are identified and those aspects of "the position" of the plaintiff which are to be ascribed to the reasonable person, for the purposes of the definition in s 5F(1).

154 If the statutory defence were intended to apply in the same manner as the old common law principle of voluntary assumption of risk, one might need to determine the circumstances and the position of the plaintiff at a time when he had a reasonable opportunity to avoid the risk. Thus, if the first time at which the plaintiff could reasonably have realised that the defendant was behaving irresponsibly with the gun was a matter of seconds before it discharged, one might say that the risk was not obvious, because there was no realistic risk if the gun was not loaded and the defendant kept it pointing away from the plaintiff.

155 Section 5K defines "obvious risk", for the purposes of Division 5, "recreational activities" as having the same meaning as in Division 4, which deals with "assumption of risk". Division 4 has two operative provisions, the first of which requires that, in determining liability for negligence, the plaintiff is "presumed to have been aware of" an obvious risk of harm unless he or she proves the contrary: s 5G(1). The second operative provision relieves a person of an obligation to warn another of "an obvious risk to" that other person: s 5H(1). In relation to s 5G, it would seem that the state of awareness, and the hence the obviousness of the risk, must have existed at the time the risk materialised. However, in relation to s 5H, in practical terms, the obviousness of the risk should be capable of being assessed at the time the putative defendant might be required to take reasonable steps to warn of the risk, were it not obvious. In reality, it seems likely that s 5H(1) will operate as a retrospective release from a failure to warn, because the obviousness of the risk can only be assessed, for legal purposes, at the time it materialises. These considerations suggest that the nature of the risk should be identified by reference to the particular circumstances and the position of the plaintiff at the time the harm is suffered or, if it be different for the purposes of s 5L, when the risk materialises.

156 There remains a question as to the level of precision with which the risk is defined and the particularity of the circumstances which are taken into account. In that respect, s 5F causes a number of difficulties. For example, sub-s(4) provides that a risk can be obvious even if the condition or circumstance that gives rise to the risk "is not prominent, conspicuous or physically observable". In the present case, the risk involves two elements: the first is that the gun be loaded and the second that it be pointed towards the plaintiff. Furthermore, sub-s (3) states that a risk can be obvious "even though it has a low probability of occurring".

157 Reading s 5F as a whole, there must have been risk that there was a bullet in the pistol prior to its discharge, even though the defendant assured the plaintiff that there was not. The fact that the presence of the bullet was not physically observable by the plaintiff is not fatal to that conclusion. Similarly, there was, prior to the discharge of the gun, a risk that the defendant would point it at the plaintiff, even though that would be a careless act, done in contravention of standard rules for the handling of firearms. Although there was no evidence of it, the plaintiff might have believed that the defendant was experienced, careful and responsible in his handling of firearms. But even if he had, that would merely mean that the risk of an accidental pointing of the gun was probably low. It would remain an obvious risk.

158 It follows, in my view, that the risk which materialised, namely the accidental discharge of a firearm whilst pointed at the plaintiff, was "an obvious risk" whatever the knowledge, belief and circumstances which existed immediately prior to the discharge.

A risk "of" the dangerous recreational activity?

159 Assuming for present purposes that the relevant activity was shooting kangaroo at night and, at least in the conditions appertaining on the day in question, it was a “dangerous recreational activity” (contrary to the conclusion reached above) it would nevertheless be necessary to determine whether the risk which materialised was an obvious risk “of” that dangerous recreational activity.

160 On the approach adopted above it is not necessary to answer this question. Nevertheless, the reasoning of the trial judge shows that this question is closely related to the identification of the relevant activity.

161 In my view, there is at least doubt that the risk which materialised was such a risk. Those risks included risks of accidental or negligent discharge of a firearm in the course of shooting (or attempting to shoot - none appears to have been shot) kangaroos. The relevant risks would include a discharge caused by the movement of the vehicle whilst seeking, chasing or approaching animals; a discharge caused while entering or leaving the vehicle, a discharge caused whilst running to a position from which a shot might be fired or whilst aiming at an animal, especially if it were moving. However, other occasions on which discharge might occur might be too far removed from the activity to form part of it. For example, if the party had returned to a hotel, or even to Sydney, the shoot having been completed, and were cleaning weapons, an accidental discharge of a gun might not have formed part of the risks of the particular hunting activity. Rather, it would have involved a risk associated with the possession and maintenance of firearms generally. An attempt to fix a jammed weapon, in the hotel or back in Sydney, might have fallen into a similar category. The question is whether such an attempt, made in the vehicle, whilst others were continuing to hunt, should be seen as part of the on-going activity, or as an incidental action.

162 The answer to this question may depend on whether the defendant had ‘given up for the night’ or was actively seeking to fix the gun, so that he could continue shooting. The evidence does not reveal any obvious answer to such a question. That is largely because, as the trial judge noted, the defendant’s own oral testimony was that “the plaintiff shot himself”. That version was not accepted by the trial judge. Nor did her Honour accept a separate version given by three members of the party to Bathurst police, shortly after the incident, namely that the defendant was outside the vehicle, as was the plaintiff, and the defendant tripped and shot the plaintiff with a rifle. That version might well have suggested that a risk of the hunting activity had materialised.

163 As noted above, her Honour concluded that she was not satisfied that the plaintiff suffered harm as a result of the materialisation of an obvious risk of a dangerous recreational activity. That appears to have been because she thought the risk of being shot while sitting in the vehicle while holding a spotlight was not obvious to a reasonable person in the plaintiff’s position. I am inclined to think that, whilst the risk of an accidental discharge of the gun, while sitting in a vehicle, may be of a different order to the risk of such an accident whilst participating in the shooting, that risk is nevertheless ‘obvious’. On the other hand, the evidence to which the Court was taken left doubt that the risk which did materialise was a risk of the dangerous recreational activity.

164 This result may appear to turn on a technicality, but I do not think that it does. The risk of accidental discharge of a firearm, causing harm to a person, is far more likely to occur during a hunting activity at night. The more general risk of accidental discharge while manipulating a firearm which is thought to be unloaded, and thereby shooting a person may be far lower.

Under the general law, care was taken to limit the defence of voluntary assumption of risk to those risks which the plaintiff should properly have been taken to have accepted, which may not have included the risk which materialised, causing harm. Thus, in *Beck v Mercantile Mutual Insurance Co Ltd* [1961] SASR 311, a pillion passenger on a motorcycle was held to have accepted the risks flowing from the lack of a headlight, but was able to recover because he suffered injury as a result of the failure of the rider to keep on the correct side of the road. The fact that the statutory defence does not require subjective acceptance of risk by a plaintiff, does not mean that a broader effect should be given to the scope of the defence than the ordinary meaning of the language requires. The language is consistent with the approach adopted under the general law. Accordingly, it is necessary for the defendant to satisfy the Court that the risk which materialised was both a risk "of" a recreational activity, and that that recreational activity was dangerous because that risk was "significant". Although I would dismiss the appeal on another ground, in my view the defendant has failed to discharge either of these burdens.

Conclusion

165 I agree with Ipp JA that there are errors revealed in the approach adopted by the trial judge with respect to these questions and, for that reason, leave to appeal should be granted. However, the defendant has not persuaded me that the recreational activity in which the plaintiff was engaged on the night in question was a "dangerous recreational activity" for the purposes of s 5L of the Act. Accordingly that defence was not made out and I agree with Ipp JA that the appeal should be dismissed with costs.