IN THE HIGH COURT OF AUSTRALIA No. C12 of 2015

CANBERRA REGISTRY

BETWEEN:

PATRICK JOSEPH STEWART
First Appellant

BERYL ANN VICKERY (NEE STEWART)
Second Appellant

MICHAEL PATRICK STEWART
Third Appellant

BENJAMIN ALLAN ACKLAND
Respondent

RESPONDENT'S SUBMISSIONS

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PART I: FORM OF SUBMISSIONS

1. This submission is in a form suitable for publication on the Internet.

PART II: ISSUES

2. The issues as framed by the Appellants, and then developed in the remainder of the Appellants' submissions, attempt to reinterpret evidence and ignore findings relating to the particular circumstances in which the Respondent was injured, without asserting any error at all in the factual findings of the trial judge and the ACT Court of Appeal. The real issues for this Court are those of legislative principle concerning the proper construction of ss.5K and 5L of the ***Civil Liability Act 2002*** (NSW).

3. The Respondent defines the central issues of principle concerning the construction of ss.5K and 5L as follows:

   (a) with what level of abstraction is the "*recreational activity*" to be defined?

   (b) does the assessment under s.5K that a "*recreational activity*" carries a significant risk of physical harm require a prospective, rather than retrospective, assessment of the risk of harm?

   (c) does the word "*significant*" in s.5K inform both the risk and the harm, so as to give content to the word "*dangerous*"?

   (d) is it necessary that the "*obvious risk*" referred to in s.5L should be a risk which involves a risk of physical harm sufficient to activate s.5K, or is it sufficient that the risk that materialised was a risk of any magnitude of any harm associated with the recreational activity?

   (e) if the risk which materialises for the purposes of s.5L is a risk which involves a significant risk of physical harm that would activate s.5K, does it logically follow that the risk must be "*obvious*" within the meaning of s.5F?

4. The issues outlined by the Appellants which go to the questions of duty of care and "*personal autonomy*" are in reality attempts to cavil with particular findings of fact made by the trial judge. Those findings of fact were largely inevitable given that the Appellants failed to adduce any evidence to support the contentions set out in their Defence.

PART III: SECTION 78B OF THE *JUDICIARY ACT*

5. The Respondent has considered whether any notice should be given in compliance with s.78B of the ***Judiciary Act 1903*** (Cth). The Respondent does not consider that any such notice is required.

PART IV: THE FACTS

Green Valley Farm

6. The Appellants are the owners and occupiers of a property known as "*Green Valley Farm*" ("*the Farm*"), situated near Tingha in northern New South Wales. The Appellants conducted a business on the Farm, comprising, in part, a holiday/amusement park to which the public were invited upon payment of an entry fee[1]. At the Farm, there were a small number of recreational devices, including a large slippery dip, a single waterslide attached to a shallow pool, a very basic rollercoaster-type trolley ride, various other pieces of equipment to climb and play in (including an inverted framework cone, and a pyramid of tyres), a collection of animals in an enclosure, and a Jumping Pillow. The latter was sited close to a family picnic area which included barbeque facilities.

7. The Farm is a place for families and children. The attractions are simple, and are not obviously directed at thrill seekers. They do not involve highly athletic activities. The inclusion of the Jumping Pillow in such a family-oriented venue is an important factor informing conclusions that a reasonable person in the position of the Respondent would reach about the risks involved in using the Jumping Pillow. Accordingly, the Respondent draws attention to the photographs of the Jumping Pillow and surrounding areas of the Farm[2], which show how the Jumping Pillow was presented.

The Day of the Accident

8. On the day of the accident (10 October 2009), the Respondent was a 21 year old law student at the University of New England ("*UNE*"). He arrived at the Farm as one of a group of students from Austin College. His evidence as to his observations of the Farm and the activities he engaged in was not challenged by the Appellants and was accepted by the trial judge. When he arrived at the Farm at around 12:15 p.m., he spent some time on other equipment and then went to the area where the Jumping Pillow was located. He saw a group of people on the Jumping Pillow, including some of his fellow students, but also a number of small children, and young girls, perhaps about 15 years of age. He said that the girls were just jumping, but the smaller children were also doing front and back flips as well[3]. Other students also gave evidence of seeing children doing back flips on the Jumping Pillow[4]. At least two of the students also went on the Jumping Pillow and performed back flips, amongst other manoeuvres. There was no evidence that any of the young people performing back flips (apart from the Respondent) suffered any injury, minor or otherwise, in the course of the day.

9. The Respondent, and others, continued to spend time on the Jumping Pillow before sampling other activities. The Respondent and three of his friends decided to go back to the Jumping Pillow. Two of them began to do back somersaults, and the Respondent

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[1] ***Ackland v Stewart*** [2014] ACTSC 18, at [2].
[2] Exhibits 1, 8, 9, 10, 13-19, 29, and 39.
[3] Transcript, at 35.13-33. Trial judgment, at [3].
[4] Transcript, at 186.3-4 (Elise Eddison), 202.34-42, 209.43-210.4 (Alexandra Croker), 212 .45-213.13 (Garth Warboys), 240.20-241.4 (Kristopher Avery), 255.6-11 (Ben Bahnsen), 264.15-35 (Riley Dayhew), 270.10-15 (Peter Jurd), 301.1-7, 302.36-303.1 (Tom McKeon).

then decided to have a go himself. On his first attempt, he said he "*landed awkwardly*"[5]. and then tried again. It was on the second attempt that he suffered the spinal injury[6].

The Comparison between Jumping Pillows, Trampolines and Jumping Castles

10. The Respondent said that he had had previous experience with a trampoline until the age of 16, and had done flips and inverted manoeuvres on that device[7]. Five other students had had past experience with Jumping Pillows, and/or trampolines, and made observations about the characteristics of the Jumping Pillow compared to a trampoline[8].

11. The Appellants state that the Respondent gave evidence that he appreciated there was a risk of hurting himself if he landed on his neck on a trampoline, "*although he later sought to resile from that evidence*"[9]. In fact, at no point did the Respondent say that he appreciated that there was any risk of significant injury from landing on his neck on a trampoline. Rather, the Respondent agreed that he had never deliberately tried to land on the back of his head, and agreed that there was a risk in doing so. He further agreed with the question "*you might hurt yourself?*", and with the follow-up question that this could occur even on a trampoline, he replied "*I guess so*"[10]. The Respondent then sought to clarify his evidence to make it clear that the risk he was referring to was "*that you could land awkwardly*"[11].

12. None of the evidence-in-chief or cross-examination of the Respondent or the other students suggested that any of the students agreed with the observation made by ***Dr Johnn Olsen*** (occupational physician and engineer) that the Jumping Pillow "... *felt like a solid surface, almost*"[12]. Neither did the lay evidence indicate that any of the students had suffered more than very minor injuries using the Jumping Pillow, or while using a trampoline at earlier times. Dr Olsen also agreed (in cross-examination by counsel for the present Appellants) that a true solid surface like a grass football field was "*much harder*" than any of a Jumping Pillow, trampoline or jumping castle[13]. In his written report, Dr Olsen described the surface of the Jumping Pillow as "*relatively unyielding, although when jumping on the pillow it does give the impression of yielding*"[14]. In explaining that comment in his report, Dr Olsen pointed out in his oral evidence that the Jumping Pillow was "*actually under pressure, whereas a trampoline is under tension*"[15]. Dr Olsen described it as a "*completely different dynamic*"[16], because, with the Jumping Pillow, it was the compression of air rather than the tension of the springs or the fabric which lifts the jumper[17]. Dr Olsen also opined that "*a soft and floppy jumping castle*" could also present some risk of cervical spine fracture

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[5] Transcript, at 38.38. Trial judgment, at [4].
[6] ***Ackland v Stewart*** [2014] ACTSC 18, at [4].
[7] ***Ackland v Stewart*** [2014] ACTSC 18, at [18].
[8] Transcript, at 193.13-44 (Elise Eddison), 251.35-254.7, 259.2-19 (Ben Bahnsen), 262.11-263.2, 265.36-266.4 (Riley Dayhew), 242.13-37 (Kristopher Avery), 300.16-43, 304.8-27, 304.35-305.20 (Tom McKeon).
[9] Appellants' submissions at [18].
[10] Transcript, at 142.45.
[11] Transcript, at 149.41-2.
[12] Transcript, at 297.35.
[13] Transcript, at 298.12-20.
[14] Exhibit 40, at 32.
[15] Transcript, at 297.13-14.
[16] Transcript, at 297.14.
[17] Transcript, at 297.15-26.

dislocation if an inverted manoeuvre was not executed properly. However, his evidence about the dynamics and risk of injury was unrelated to the question of whether the risk of such an outcome on a jumping castle or on the Jumping Pillow would have been discernible (let alone "*obvious*") to a reasonable person evaluating the Jumping Pillow as it was presented by the Appellants to patrons of the Farm. Further, Dr Olsen also noted that the incident in which the Respondent received his injuries could have been prevented at negligible cost[18].

13. The trial judge found that "*although somewhat firmer than the surface of a trampoline to walk on, the Jumping Pillow performs very much like a trampoline*"[19]. His Honour noted that Dr Olsen did not conduct any tests to contrast the compressibility of the Jumping Pillow with that of a trampoline. His Honour also noted that other witnesses, such as Thomas McKeon, saw "*little difference*" between the two.

Supervision by the Staff and the Placement of Signs at the Farm

14. The Respondent said there was no one at the Jumping Pillow giving directions to fellow students or himself, or to anyone else, about what they should, or should not, do on the Jumping Pillow[20]. This evidence was supported by most of the other students who gave evidence at the trial about the events on the day of the accident[21]. There was evidence that "*Stephanie*", the daughter of the Second Appellant, was at a counter between the waterslide and the Jumping Pillow, and had a clear view of the Jumping Pillow[22], and could observe the performance of inverted manoeuvres.

15. The Appellants originally filed a verified Defence to the claim made by the Respondent which alleged that they had in place, at the time of the accident, signs which expressly prohibited "*somersaults and inverted manoeuvres*". This claim was false, as demonstrated by photographs taken on the day of the accident[23]. On the second day of the trial, the Appellants withdrew the allegation that signs prohibiting "*somersaults and inverted manoeuvres*" had been present on the day of the accident[24]. However, a handwritten sign to that effect was in place by 14 October 2009 (four days after the accident), when a WorkCover Inspector came to the Farm to inspect the Jumping Pillow[25].

Correspondence from the Distributor of the Jumping Pillow

16. In a letter dated 28 August 2009 headed "***MUST READ***", which was received by the Appellants, the Australian distributor of Jumping Pillows notified the owners of Jumping Pillows that they had engaged OH&S consultants "*to audit our business operations and to consider any hazards resulting from normal use of the pillows*"[26]. The letter enclosed a new User Manual, and drew attention to the "*Safety*" chapter. The

[18] Exhibit 40, at 38.
[19] ***Ackland v Stewart*** [2014] ACTSC 18, at [301].
[20] ***Ackland v Stewart*** [2014] ACTSC 18, at [34].
[21] Transcript, at 194.1-6 (Elise Eddison), 215.33-214.10 (Garth Warboys), 241.6-11 (Kristopher Avery), 256.1-257.2, (Ben Bahnsen), 270.20-21 (Peter Jurd), 302.11-31 (Tom McKeon).
[22] Transcript, at 192.8-36 (Elise Eddison), 218.10-219.14 (Garth Warboys).
[23] See e.g. Exhibit 7, photographs 25 and 26.
[24] Amended Defence, dated 18 April 2013 [*sic*]; filed in Court, 18 April 2014: Transcript, at 176.1-20.
[25] Exhibits 8 & 39; Transcript, at 249.24-250.24 (Gary Mason).
[26] Part of Exhibit 6.

letter recommended that additional signage be attached to the Jumping Pillow to include words to the effect of "*NO SOMERSAULTS OR INVERTED MANOEUVRES*". A further recommendation was made that owners of a Jumping Pillow should update their existing Pillow Rules board with the recommended sign (i.e. containing the prohibition on somersaults or inverted manoeuvres) as soon as possible. The letter offered to make stencils available for those who would like to have the rule prohibiting somersaults or inverted manoeuvres stencilled on their Jumping Pillows, at a cost of $184 or $232 (including GST and postage) depending on the particular Pillow model. The updated User Manual referred to in the letter recommended that clients should seek advice from their insurance company or lawyer concerning the precise rules that should apply to the use of the Jumping Pillow. The User Manual also contained the following statement: "*It is recommended that the Jumping Pillow is not used before the 'Jumping Pillow or User Rules' are installed and clearly visible to patrons*"[27].

17. The presentation of the scene to the WorkCover Inspector on 14 October 2009, four days after the Respondent's accident, is evidence of the appropriateness of the distributor's recommendation sent out in August 2009.

Failure of the Appellants or their Employees to Give Evidence

18. At the trial, none of the Appellants gave evidence at all, nor did any other employee of the Farm. Neither was any other oral evidence led on behalf of the Appellants contradicting any other aspect of the case on liability put by the Respondent, apart from evidence from a single lay witness (Mrs Kelly), presented as an independent visitor to the Farm on the day of the accident. To the extent that the evidence of that witness contradicted evidence given in the Respondent's case, it was not relied upon by the Appellants, nor was it accepted by the trial judge[28].

Performance of Backflips on the Jumping Pillow with the Knowledge and Approval of the Appellants

19. Following the installation of the Jumping Pillow, the Appellants had joined *Facebook* and promoted the Jumping Pillow on their *Facebook* site. A *Facebook* entry in February 2008 posted under the name "*Green Valley Farm Tingha NSW*" drew attention to the recent installation of the Jumping Pillow, and offered the following invitation: "*any good backflipers try this out. the record on this pillow is 18 flips in a row*"[29]. That invitation remained on the Green Valley Farm *Facebook* site up to, and after, the Respondent's accident. Another entry on the *Facebook* site, posted on 29 January 2008 by Brayden Vickery, aged 14, a member of the Appellants' family, proclaimed "*my friend jordan done 18 back flips non stop on the jumping pillow*"[30]. A third entry, posted on 16 April 2010 by one Leslie Kelly stated "*I can do lyk 12 bakkies in row on that* [smiley face]"[31]. However, photographic evidence was adduced by the Respondent showing that by 2012 the Appellants had had the rule prohibiting somersaults and inverted manoeuvres stencilled on their Jumping Pillow[32]. At the time of the visit by

[27] Part of Exhibit 6, User Manual at p.4, under "General Safety Rules".
[28] See evidence of Lisa Jane Kelly, Transcript, at 340-362; ***Ackland v Stewart*** [2014] ACTSC 18, at [279].
[29] Exhibit 5.
[30] Exhibit 5.
[31] Exhibit 5.
[32] Exhibit 11.

Dr Olsen, a professionally produced sign incorporating the prohibition against somersaults and inverted manoeuvres was also on display near the Jumping Pillow[33].

20. Unchallenged evidence was given by two of the students present on the day of the accident of conversations with the Second Appellant and her daughter, following the Respondent's accident[34]. In the course of those conversations, the Second Appellant's daughter said that they had recently had a staff party where members of staff had been drinking and performing aerial manoeuvres (including flips) on the Jumping Pillow, and no-one had been injured.

21. The above evidence is not relied upon as an admission of liability on the part of the Appellants, contrary to s.5C(c) of the Civil Liability Act. Rather, it is evidence that the risk of significant physical injury from performing backflips on the Jumping Pillow may not been "*obvious*" to the Appellants, despite their considerable familiarity with the device, up until the receipt of the letter from the distributor of the Jumping Pillow a few weeks before the Respondent's accident. However, from that point on, the Appellants were on notice that somersaults and inverted manoeuvres presented a sufficient risk to the safety of users of the Jumping Pillow to justify specific action to prevent such activities occurring, through a prohibition and appropriate signage, such as was subsequently put in place.

PART V: APPLICABLE LEGISLATION

22. The Respondent accepts the Appellant's statement of the currently applicable statutory provisions.

PART VI: STATEMENT OF ARGUMENT

Issues of Construction in Sections 5K and 5L

23. The proper construction of ss.5K and 5L of the ***Civil Liability Act 2002*** (NSW) ("the CL Act") commences with the proposition that the Draconian consequence of complete exclusion of liability for negligence in s.5L applies only where the relevant injury has occurred in the course of the injured person engaging in a "*dangerous recreational activity*". In cases where the s.5L test is not satisfied, or the relevant activity is not characterised as a "*dangerous recreational activity*", it does not mean that an injured person is entitled to damages. It simply means that the ordinary law of negligence applies.

24. **The Level of Abstraction in s.5K**: It is submitted that a wide range of sports such as downhill snow skiing, high speed water skiing, skydiving, hang gliding, scuba diving, extreme mountain biking, motor racing and bungee jumping, would be ordinarily regarded by an ordinary reasonable person as members of the class of "*dangerous recreational activities*", even without specific reference to any particular risks of the

[33] Exhibit 40, at 15.
[34] Transcript, at 208.5-209.2 (Alexandra Croker), 215.34-.43, 222.25-223.17 (Garth Warboys).

activity. At a general level of abstraction, no extensive analysis or expert evidence is required.

25. However, the level of abstraction used to identify the "*recreational activity*" becomes more significant when dealing with common recreational activities which may be regarded as generically not "*dangerous*", but which may on a particular occasion involve a specific occurrence creating a significant risk of some kind of injury. The question of how specifically the "*recreational activity*" is described is important, both as to the assessment of risk under s.5K, and the context in which the obviousness of the risk that materialised is to be assessed under s.5L.

26. **The Interaction of "Risk" and "Harm" in s.5K**: The issue is where on the spectrum between "*serious physical harm*", and "*trivial physical harm*" does a "*significant risk*" of suffering harm activate s.5K? Section 5K defines a "***dangerous** recreational activity*". If the word "*significant*" does not apply to both the "*risk*" and the "*harm*", then what work does the word "*dangerous*" have left to do?

27. Other difficult issues are raised where, as in the present case, a "*recreational activity*" is being offered to members of the public by a provider who constructs and controls the environment in which the activity is being carried out. That situation may be differentiated from skiing, skydiving, hang gliding or scuba diving, where the risks of injury may flow at least as much from the uncertainties involved in the interaction with the natural world, as from anything done by the facilitator of the activity.

28. **The Perspective from Which "Risk" and "Harm" Must Be Assessed**: The trial judge found that it was "*inevitable*" that the performing of a back somersault on a Jumping Pillow was to be characterised as a "*dangerous recreational activity*"[35]. In reaching that conclusion, the trial judge noted that the matter must be "*assessed objectively*", which is plainly correct. However, the trial judge did not consider whether that matter should be assessed prospectively, rather than retrospectively.

29. **The Obvious Risk Referred to in Section 5L**: Every activity properly characterised as a "*dangerous recreational activity*" will probably give rise to a number of risks. Some of those risks may be unique to the particular activity and give it the quality that results in the activity being described as "*dangerous*". Other risks may simply be generic risks arising in many activities which are not be generally regarded as "*dangerous*". For example, scuba diving may involve climbing aboard a boat from a dock in order to travel out to a diving spot. The risk of a slipping or tripping injury in the course of boarding may be significant in some cases, and also "*obvious*", but not intrinsically any different to boarding any other boat of similar size and condition for a purpose that no one would regard as "*dangerous*", such as a sightseeing tour around Sydney Harbour. Assuming that the slip or trip was causally related to an act or omission of the provider of the boat, there is no obvious policy reason why such a slip or trip occurring to a scuba diver should be treated any more harshly than a slip or trip occurring to a sightseer. Is the intention of the legislation that the risk which materialises should be a risk which would activate s.5K in relation to the particular "*recreational activity*"? That raises the further issue of whether, if the risk which

[35] ***Ackland v Stewart*** [2014] ACTSC 18, at [296].

materialises is a risk which would activate s.5K, it must (by definition) be an "*obvious risk*".

Resolution of the Issues – Construction of Section 5K

30. **The Level of Abstraction in Section 5K**: The Respondent submits that the definition of "*recreational activity*" in s.5K is expressed in terms which are consistent with an intention to describe activities with a broad level of abstraction. The level of abstraction has been considered in cases decided by the NSW Court of Appeal, notably ***Fallas v Mourlas***[36]. That case suggested that there were considerations working both for and against categorising the relevant activity at a broad level of abstraction. Whereas Ipp and Tobias JJA thought that the scope of the relevant activity must be determined by reference to the particular activities engaged in by the injured person in the period immediately before suffering the relevant harm, Basten JA took a broader view. In subsequent cases, it appears that the position of Ipp and Tobias JJA has assumed greater acceptance. However, the discussion by Ipp JA of the "*unfairness*"[37] to defendants which might be caused by a broader level of abstraction in describing the relevant "*recreational activity*", is (with respect to his Honour) misplaced. It is not "*unfair*" to a defendant that an injured person's cause of action in negligence should not be completely denied, when the defendant retains both the option to deny any breach of duty, and to argue that the injured person was guilty of contributory negligence (which could be as much as 100% under s.5S).

31. Paragraph (a) of the definition in s.5K applies the term "*recreational activity*" to "*any sport*", which suggests that where recognised sports are concerned, a generic description, e.g. "*rugby*", is appropriate, rather than a detailed description of one aspect of what a person might do in the course of that sport, e.g. "*act as hooker in a scrum*". Paragraph (b) refers to "*any pursuit or activity engaged in for enjoyment, relaxation or pleasure*". That description could include anything apart from work carried out under direction, provided that it answered the general description of a "*pursuit or activity*", not being a sport, which once again suggests more a more than an single discrete act. Paragraph (c) appears to apply to any activity undertaken at a relevant "*place*", even if that activity is not itself one undertaken for "*enjoyment, relaxation or pleasure*".

32. Nothing in the definition of "*dangerous recreational activity*" compels the conclusion in the present case that the activity of being on the Jumping Pillow should be broken down into a series of very precise actions of different kinds, which cover the entirety of what may be done on the Pillow, any more than playing "*rugby*" is adequately described as a combination of a number of precise individual actions, some of which may present a risk of significant harm, and others not. While all of the individual items may contribute to an assessment of the risk of harm from playing rugby, it would be misleading to consider them individually, if the intention is to assess the magnitude of the risk of physical harm from playing that "*sport*". In short, it is submitted that the magnitude of the risk of harm applicable to the sport or activity should be assessed by considering the sport or activity as a whole.

33. This approach also leaves the doctrine of contributory negligence with significant and useful work to do in the context of a "*recreational activity*". It means that an injury

[36] ***Fallas v Mourlas*** (2006) 65 NSWLR 418, at 424-427 (Ipp JA), 432-433 (Tobias JA), 439-440 (Basten JA).
[37] ***Fallas***, at 425, paragraph [39].

occurring as the result of a discrete unsafe action performed voluntarily (and perhaps on the spur of the moment) in the course of an otherwise non-dangerous "*recreational activity*", would not automatically result in the injured person being denied a cause of action against another person providing or facilitating that activity. Rather, the question would be one of apportionment of responsibility in accordance with ss.5R and 5S. This will be especially significant in a case where the allegedly dangerous action was only able to occur because the organiser of the "*recreational activity*" failed to supervise it appropriately.

34. **A Significant Risk of Serious Harm**: The proposition that the word "*significant*" in s.5K informs not only "*risk*" but also "*harm*" was accepted by Ipp JA (with whom Hunt AJA and Adams J agreed) in ***Falvo***[38], the first case to consider s.5K. The Respondent submits that this is the correct approach. Both s.5K and s.5L are concerned with the consequences of "*dangerous*" recreational activities. The word "*dangerous*" must be given some work to do in construing the definition. The ordinary meaning of the word "*dangerous*" is defined by the Macquarie Dictionary as "*full of danger or risk; causing danger; perilous; hazardous; unsafe*". It implies a probability of serious harm, not minor harm. Cooking carries a significant risk of minor cuts and burns, and cutting out paper shapes in kindergarten carries a significant risk of scissor cuts, especially for 5-year-olds, but neither could be seriously described as a "*dangerous*" recreational activity.

35. However, in ***Falvo***, and subsequent cases, the definition of "*dangerous recreational activity*" was treated as a spectrum extending from a very high risk of minor harm, at one end, to a small risk of catastrophic harm at the other end. The Respondent submits that a small risk of catastrophic harm would not be sufficient to characterise an activity as "*dangerous*". As Penfold J pointed out in in the present case, that would result in activities such as private car travel and commercial air travel being possibly categorised as "*dangerous recreational activities*", despite being viewed as generally safe and entirely sensible activities to engage in[39]. Similarly, there seems to be acceptance in the cases that a significant risk of minor harm would also not be sufficient to characterise an activity as "*dangerous*".

36. Second, the evident policy behind the enactment of ss.5K and 5L was not to absolve the providers of recreational activities carrying a significant risk of minor harm from any potential liability. To do so would be the use of a sledgehammer to crack a nut that is adequately catered for under the existing law of contributory negligence. Rather, the legislation recognises that many people will seek out activities containing a known risk of ***serious*** harm in order to experience the thrill of taking that risk, and that other people will seek to cater for thrill seekers of that kind by providing opportunities for people to experience the relevant activities. In that context, it is submitted that the apparent intention was to relieve the providers of "*dangerous*" activities, i.e. activities carrying a significant risk of serious (but not necessarily catastrophic) harm, from liability for the materialisation of obvious risks of those activities. That view of s.5K is consistent not only with the object of ensuring that people take "*personal responsibility*" for the consequences of seeking out the thrill that comes from risk-taking activities, but also furthers the object of reducing the burden of insurance which otherwise might fall upon

[38] ***Falvo v Australian Oztag Sports Association*** (2006) Aust Torts Reports 81-831, at [28]-[31].
[39] ***Stewart v Ackland*** (2015] ACTCA 1, at [34].

facilitators of such activities, whether the risk of harm arises through the fault of the provider, or as an inherent part of the activity itself.

37. In the case of the Jumping Pillow, the magnitude of the risk of harm arising from activities likely to be performed on it would need to take into account the fact that the device presents no inherent risks from simply being on it, unlike (for example) participation in skydiving where every jump, however carefully and cautiously performed, carries a risk of serious injury or death from parachute failure, aircraft failure, or unanticipated weather. It is within the power of the owners and operators of a Jumping Pillow to supervise its operation so as to eliminate risks arising from voluntary decisions made by patrons. Such supervision is in any event an important aspect of the operation of the Jumping Pillow, because by its nature it involves a number of users of different ages on the device at one time, pursuing their own range of activities.

38. **A Prospective Assessment**: The trial judge correctly made an objective assessment of the risk attaching to the activity he defined as the relevant "*recreational activity*". However, the Appellants, the trial judge and the majority of the Court of Appeal relied upon the opinion of Dr Olsen to justify the argument that the Jumping Pillow involved "*a significant risk of physical harm*" to users attempting backflips, due to the risk that they could suffer a hyperflexion or hyperextension spinal injury as a result of landing awkwardly. This was plainly a retrospective assessment, because the opinion of Dr Olsen was obtained for the purposes of the trial.

39. The NSW Court of Appeal authorities are clear that an assessment for the purposes of s.5K about the risk of harm attaching to a "*recreational activity*" is one to be notionally made **prospectively**, from a point in time shortly before the Respondent's accident[40]. While the expert opinion of Dr Olsen represented a valuable input into the trial judge's consideration of the factual decisions required under both s.5K and s.5L, his subjective impression of standing on the Jumping Pillow could not be of more than limited value in deciding the factual question of whether a person not possessing Dr Olsen's qualifications, and evaluating all of the relevant circumstances, would have prospectively considered there was a significant risk of serious harm occurring.

40. Where an occupier of premises provides and promotes a Jumping Pillow for use by the general public (including children), any prospective risk assessment carried out by a reasonable person entering the premises and considering using the Jumping Pillow is significantly informed by the manner in which the Jumping Pillow is presented to patrons by the provider of the Pillow. This is especially true where the patron is likely to be unaware of the biomechanics of failing to correctly execute a somersault, as the trial judge found was the case with the Respondent[41].

41. The trial judge set out eight observations[42] that would be made by a reasonable person in the position of the Respondent that his Honour regarded as relevant to the question of whether there was an "*obvious risk*" of serious neck injury. However, all of those

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[40] See, for example, ***Lormine Pty Ltd v Xuereb*** [2006] NSWCA 200, at [31] (per Mason P), quoted with approval in ***Jaber v Rockdale City Council*** [2008] NSWCA 98, at [42]. See also ***Laoulach v Ibrahim*** [2011] NSWCA 402, at [122].

[41] ***Ackland v Stewart*** [2014] ACTSC 18, at [296].

[42] ***Ackland v Stewart*** [2014] ACTSC 18, at [301].

observations also militate strongly against any prospective assessment by a reasonable person that performing any activities on the Jumping Pillow was likely to involve a significant risk of anything more than minor harm.

42. The trial judge did not consider the totality of the evidence going to the manner in which the Appellants had presented the Jumping Pillow to users, and the inferences that would be drawn by a reasonable person from that presentation. The additional factors that the Respondent says should have been taken into account are set out in the Notice of Contention. When all of these factors are taken into account, the Respondent submits that Penfold J was correct in finding that, in the present case, the performance of backflips was not (even when evaluated as a discrete activity, and not as part of the whole usage of the Jumping Pillow) a "*dangerous recreational activity*".

Resolution of the Issues – Construction of Section 5L

43. **An Obvious Risk of a Dangerous Recreational Activity**: Section 5L is intended to pick up obvious risks "*of*" the "*dangerous recreational activity*", not any risk of harm that may occur ancillary to that activity that has little to do with what makes the activity "*dangerous*". It is submitted that the risk referred to in s.5L must be a risk (but perhaps one of several such risks) which would, in the context of s.5K, result in the relevant recreational activity being categorised prospectively as "*dangerous*".

44. In applying that submission to the present case, we may put to one side for present purposes the question of the level of abstraction in defining the "*dangerous recreational activity*". The trial judge found that the risk that made the performance of backflips on the Jumping Pillow "*dangerous*" was the risk of "*serious neck injury*". That characterisation of the relevant risk was not formulated by the trial judge, nor by the Respondent, but by the Appellants themselves in their written submissions[43]. If the "*dangerous recreational activity*" was correctly defined as the performance of backflips on the Jumping Pillow, the trial judge made no error in adopting the Appellants' characterisation of the risk attaching to that particular action. Indeed, the Respondent submits that "*a significant risk of a minor injury*" would have been insufficient to justify the conclusion that doing backflips was a "*dangerous recreational activity*".

45. **Materialisation of the Same Risk as that which Activates Section 5K**: Although the risk of injury which results in the activity being characterised as "*dangerous*" need not be the same risk as materialises so as to cause the person harm, in this case there is no dispute that the risk identified by the trial judge for the purposes of s.5K was the same as the risk which materialised for the purposes of s.5L. The Respondent was not injured as a result of the materialisation of a risk that he might suffer a sprained ankle or a bruised shoulder, or some other minor injury.

46. If the view taken by the trial judge and Walmsley J (with whom Robinson J agreed) is correct, and the scope of the putative "*dangerous recreational activity*" may be narrowly articulated, and the risk of physical harm then assessed retrospectively by reference to the subjective assessment of Dr Olsen of the hardness of the surface, then the fact that the same risk materialised for the purposes of s.5L makes no difference. The reason is that the assessment of the obviousness of the risk under 5L is undoubtedly

[43] ***Ackland v Stewart*** [2014] ACTSC 18, at [297].

both objective and prospective, viewed from the perspective of a reasonable person in the position of the Respondent before the relevant activity is undertaken. It becomes a factual assessment, taking into account all of the circumstances, whether the risk is obvious within the meaning of s.5F. As noted earlier, the trial judge listed eight factors that a reasonable person in the position of the Respondent would have taken into account in assessing the risk of serious neck injury[44], and concluded that the risk would not have been "*obvious*". That was a finding of fact open to his Honour.

47. If Penfold J (supported by the case law in the NSW Court of Appeal) is correct, and the characterisation of the activity for the purposes of s.5K is also undertaken prospectively, then the same kind of factual assessment will need to be made about the risk of significant harm arising from the activity, taking into account all of the circumstances in which the activity is presented to the person. Plainly, the obviousness of the risk will significantly affect an assessment of whether the activity carries a significant risk of physical harm, in the absence of specific evidence that a reasonable person would have been aware of the risk from some source other than his or her own senses.

48. Whether Penfold J and the NSW Court of Appeal are correct, or Walmsley and Robinson JJ are correct, the outcome in the present case will be the same.

49. First, if the activity engaged in by the Respondent is prospectively assessed as having no significant risk of physical harm in the particular circumstances facing the Respondent, then the relevant activity will not be characterised as a "*dangerous recreational activity*", and s.5L will simply not apply. On the other hand, if the risk of physical harm of the activity is assessed retrospectively through the use of the expert evidence of Dr Olsen (whose analysis of the biomechanics of failing to correctly execute a somersault was unknown to the Respondent) and found to be significant, then there is no logical inconsistency if the inquiry that subsequently takes place for the purposes of s.5L produces a factual conclusion that the retrospectively assessed risk of significant harm that makes the activity "*dangerous*" was not prospectively "*obvious*" in the circumstances that faced the Respondent. Any conclusion that the risk was "*obvious*" to a reasonable person in the position of the Respondent would also have to reconcile that conclusion with the evidence indicating that the Appellants behaved as if the risk from performing somersaults on the Jumping Pillow was not "*obvious*" to them, despite their daily experience in the use and operation of the Jumping Pillow.

50. Second, the language of s.5L itself pre-supposes that the Respondent could be injured by a risk of a dangerous recreational activity that is not obvious. In each case, the reasonable person in the position of the Respondent must weigh up a number of factors which were known to, or capable of being observed or experienced by, the Respondent and then make a judgment as to what risks those factors present. In evaluating what the reasonable person would have done in relation to the risks posed by undertaking back somersaults on a Jumping Pillow, it is a question of fact for the Court in each case to consider whether the risk of the injury that ultimately materialised would have been "*obvious*" to the reasonable person undertaking that exercise of weighing up the relevant factors.

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[44] ***Ackland v Stewart*** [2014] ACTSC 18, at [301].

51. In this case, the trial judge undertook a process of identifying the relevant factors, and drew the factual conclusion that the risk of the injury that ultimately materialised was not "*obvious*" to a reasonable person in the position of the Respondent. The Appellants have not demonstrated any error in the process undertaken by the trial judge on that issue. Similarly, the Court of Appeal correctly applied the principles set out in the authorities and reached the same conclusion as to the obviousness of the risk that materialised.

Consideration of the Extrinsic Materials

52. In the event that this Court may consider it appropriate or necessary to have regard to the extrinsic materials in accordance with one or more of the permissible uses of the material under s.34 of the ***Interpretation Act 1987 (NSW)***, the Respondent submits that those materials either support, or are not inconsistent with, the construction of ss.5K and 5L contended for by the Respondent.

53. Sections 5K and 5L were enacted by the ***Civil Liability Amendment (Personal Responsibility) Act 2002*** (NSW) ("the CL Amendment Act 2002")[45]. In the context of the CL Amendment Act 2002, read as a whole, it is clear that the intention of the amendments was to impose upon citizens a greater level of responsibility for their own safety, including in negotiating obvious and inherent risks associated with everyday life, and voluntary participation in recreational activities.

54. These objectives are confirmed by reference to the *Ipp Report*[46], upon which the amendments were based, and by the Second Reading Speech given by the then Premier when the legislation was introduced into the NSW Legislative Assembly[47]. Two purposes were identified behind the personal responsibility amendments. First, they were intended to deal with perceived problems at that time regarding the availability of public liability insurance, by reducing the situations in which claims could be maintained. Second, they were intended to correct a perceived drift towards what was described by the Premier as "*the Americanisation of our legal system*", which required a winding back of the "*culture of blame*" in order to preserve the community's access to socially important activities (for which public liability insurance might ordinarily be required by the providers).

55. The inclusion of specific legislation dealing with risks associated with recreational activities arose at the initiative of the Expert Panel which prepared the Ipp Report. The specific recommendation for legislative action made in the Ipp Report was as follows[48]: **The provider of a recreational service is not liable for personal injury or death suffered by a voluntary participant in a recreational activity as a result of the materialisation of an obvious risk.** The Expert Panel thought that this recommendation could be explained in terms of the defence of "*assumption of risk*", which had become essentially defunct since the statutory introduction of apportionment for contributory negligence[49]. The intention was that the recommendation would apply the basic idea of voluntary assumption of risk to situations where the "*recreational*

[45] Act No 92 of 2002.
[46] ***Review of Law of Negligence Report***, Expert Panel (Justice David Ipp, Chair), Final Report, September 2002.
[47] NSW ***Hansard*** (Legislative Assembly), 23 October 2002, at 5764.
[48] Ipp Report, at 64.
[49] Ipp Report, at 66, paragraph 4.21.

activity" carried risks that would be obvious to the reasonable person, regardless of whether the injured person was actually aware of those risks.

56. The Expert Panel paid particular attention to the definition of "*recreational activity*", noting that the definition in the related Commonwealth Bill[50] to amend the then Trade Practices Act was too wide to be adopted in this context. The Expert Panel preferred a narrower definition, limited to "*activities that involve significant risks of physical harm*", because (it was said) "*such activities are the sort that people often participate in partly for the enjoyment to be derived from risk-taking*". The Panel accepted that some would consider the recommendation to be a "*harsh rule*", but noted *inter alia* that it would "*apply only to a limited class of recreational activities of which it can be said that a significant element of physical risk is an integral part*"[51].

57. The Expert Panel did not provide examples of the "*limited class of recreational activities*" where a "*significant element of physical risk is an integral part*". However, categorisation of the class in that fashion suggests that the Expert Panel did have in mind the kinds of sporting activities that carry notorious risks well-known to ordinary members of the community.

58. In summary, the Respondent submits that the extrinsic materials suggest that the policy intent of both the Ipp Report and the Parliament was to approach the identification of a "*dangerous recreational activity*" at a broad level of abstraction, and that the intent was not to pick up individual risky acts in the course of an otherwise benign sport or other recreational activity. In particular, it is difficult to see how any activity carried out on a Jumping Pillow would fit into the "*limited class of recreational activities of which it can be said that a significant element of physical risk is an integral part*".

59. Moreover, the extrinsic materials suggest that the exclusion of liability under s.5L was not intended to be triggered by the materialisation of an obvious risk of "*minor harm*", particularly in the context of a "*recreational activity*" that, in large part, is directed at children, as is the Jumping Pillow.

Duty of Care and Breach If Section 5L Does Not Apply

60. **Appellants' Argument on Duty of Care**: The Appellants do not dispute that they owed a duty of care to persons using the Jumping Pillow. However, in relation to the scope of the duty of care, the Appellants are obliged to try and reconcile that argument with their argument relating to ss.5K and 5L, however difficult that may be.

61. In relation to ss.5K and 5L, the Appellants argue that carrying out somersaults and inverted manoeuvres on the Jumping Pillow is a "*dangerous recreational activity*" capable of producing a catastrophic neck injury, and that risk was obvious to a reasonable person in the position of the Respondent. By extension, it must follow that a reasonable person in the position of the Appellants would also have perceived that risk of catastrophic injury arising from carrying out backwards somersaults on the Jumping Pillow, given their much greater familiarity with the characteristics of the Pillow, and the correspondence from the distributors of the Jumping Pillow

[50] *Trade Practices Amendment (Liability for Recreational Services) Bill 2002.*
[51] Ipp Report, at 66, paragraph 4.22.

recommending a specific prohibition on somersaults and inverted manoeuvres, shortly before the Respondent's accident.

62. On the other hand, the Appellants say that their duty of care to users of the Jumping Pillow did not oblige them to prohibit somersaults and inverted manoeuvres, because that would be at odds with giving primacy to "*personal autonomy*", which (it is said) includes the autonomy to choose to engage voluntarily in physically dangerous actions on the Jumping Pillow, notwithstanding its evident presentation as a family activity safe for children. Clearly, this argument contains the implicit suggestion that the Appellants made a principled decision not to prohibit patrons to carry out somersaults or inverted manoeuvres, notwithstanding the "*obvious*" risk of catastrophic injury to them, in deference to the principle of "*personal autonomy*". However, there is no evidence whatsoever to suggest that the Appellants held any view that taking no action to prohibit somersaults and inverted manoeuvres could be justified by reliance upon any supposed principle of the common law.

63. **"Personal autonomy" has no relevance to the facts of the present case**: There is no general "*principle of personal autonomy*" which has any legal status sufficient to avoid the imposition of a duty of care on accepted principles, or to influence the construction of provisions of the Civil Liability Act. No argument based on the notion of "*personal autonomy*" was put to the trial judge, either in relation to the existence of a duty of care, or to the breach of any such duty in the circumstances of this case. Neither was the trial judge referred to the two High Court decisions now relied upon by the Applicants[52].

64. Putting s.5L to one side, the decision in this case does not turn on whatever might be encompassed by the notion of "*personal autonomy*", even if there had been any evidence that the Appellants themselves had even heard of such a notion before this case commenced. The environment in which the Respondent's injury occurred was totally under the control of the Appellants. The Jumping Pillow was not presented as a device for thrill seekers, as are (for example) high-speed rollercoasters and other sophisticated rides at large commercial amusement parks. The Applicants were offering the Jumping Pillow for use by any person paying the price of entry to the Farm, including children, and the nature of that device required a level of supervision.

65. The case turned on whether, on the proper application of s.5B, a duty of care was owed to the Respondent by the Appellants in relation to the use of the Jumping Pillow, and whether any such duty had been breached. To the extent that "*personal autonomy*" has a place in the common law, it is already built into the Civil Liability Act to the extent that the New South Wales Parliament thought appropriate.

66. Given acceptance of the factual finding that the risk of serious neck injury from doing a backward somersault on the Jumping Pillow was present but not obvious to a reasonable person in the position of the Respondent, the trial judge and the Court of Appeal were entitled to conclude on the undisputed facts of the case that (a) the risk of serious neck injury was foreseeable by the Appellants, (b) the risk was not insignificant, and (c) a reasonable person in the position of the Appellants would have taken those precautions recommended to the Appellants by the distributor of the Jumping Pillow, together with reasonable supervision. In short, it was open to the trial judge and the

[52] ***Agar v Hyde*** (2000) 201 CLR 552 at [90]; ***Stuart v Kirkland-Veenstra*** (2009) 237 CLR 215 at [87].

Court of Appeal to conclude, in accordance with s.5B, that the Appellants were subject to a duty of care to the Respondent, and had breached that duty.

67. In relation to the issue of causation under s.5D, the Respondent adopts the observations of Walmsley J in the ACT Court of Appeal[53].

Conclusions concerning the Appellants' Grounds of Appeal

68. The Appellants have not made out any basis for setting aside the decisions made by the trial judge and the ACT Court of Appeal, even if the Court accepts that the trial judge and the majority of the Court of Appeal erred in failing to carry out a prospective assessment under s.5K.

69. The factual findings of the trial judge which are contested by the Appellants were findings open to the trial judge, amply justified by the evidence adduced by the Respondent, and by the complete absence of any relevant evidence adduced by the Appellants.

70. The appeal should be dismissed.

PART VII: NOTICE OF CONTENTION

71. The Respondent has filed a Summons seeking leave to file a Notice of Contention out of time. The Summons is returnable on the morning of the hearing on 3 December 2015. The Notice of Contention deals with the issue of whether the recreational activity engaged in by the Respondent was properly characterised by the trial judge and the majority of the ACT Court of Appeal as a "*dangerous recreational activity*". For ease of reference, the submissions on that issue have been incorporated into the paragraphs in these submissions dealing with the proper construction of s.5K.

PART VIII: ESTIMATED HOURS

72. It is estimated that 2 hours will be required for the presentation of the Respondent's oral argument.

Dated: 4 November 2015

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PAUL WEBB QC

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LEO GREY

Counsel for the Respondent

[53] *Stewart v Ackland* [2015] ACTCA 1, at [167].