

by P.F. Mylne

Obvious risks in the workplace

1 What is an obvious risk?

There has been much discussion in recent years as to the principles to be applied in cases where plaintiffs seek damages from courts in circumstances in which the injury, sometimes catastrophic, is suffered as a consequence of the plaintiff engaging in risky behaviour.

It has frequently been said that such a plaintiff has engaged in behaviour which carries with it an 'obvious risk'. Is such behaviour able to be defined more accurately?

In *Wyong Shire Council v Vairy*,¹ Tobias JA considered that question and adopted the definition contained in the 'Restatement (Second) of Torts' (1965). He stated:²

"In that commentary 'obvious' is defined 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.'

"In this definition, 'condition' refers to the factual scenario facing the plaintiff. Thus, in a diving case the condition might typically be the fact that the plaintiff is faced with water of unknown depth. Under such a condition, the risk would be that diving into the water (while the depth remains unknown) might result in 'serious' injury. The risk would be considered obvious if, in the context of the case, it was perceptible to a reasonable person in the position of the plaintiff that if you do not know the depth of a body of water into which you are about to dive, then to dive into such water under such conditions inevitably brings with it the risk of injury."

2 Summary of the duties owed to an employee in the context of the existence of obvious risks

The employment relationship, of course, is one of those in which the standard of care is high. In circumstances in which employees engage in risk-taking behaviour in the course of employment however, the applicable principles have not always been as benevolent as they currently stand. In *Waverley Municipal Council v Swain*³ Spigelman CJ gave a brief summary of the development of the law in this respect.

In *Bressington v The Commissioner of Railways (NSW)*⁴ a widow sued the Commissioner of Railways on the death of her husband, a railway worker. He had been struck by a railway van which moved forward suddenly during a shunting operation. There were two acts of negligence alleged by the plaintiff which failed:

(a) there was no notice warning people in the yards

A consideration of the principles to be applied where employees/contractors engage in risk-taking conduct

of the danger of crossing the lines;

(b) there was no system of warning people when stationary trucks situated in the shunting yard were above to move.

The Full Court of the New South Wales Supreme Court dismissed an appeal by the plaintiff. In the High Court, only the second particular was argued and, by a majority 4-1, the appeal was dismissed. This robust approach in respect of requiring employees to look out for their own safety was reflected as late as 1972 in *Sydney City Council v Dell'Oro*.⁵ Jacobs J found that there was no negligence in circumstances in which a skilled electrician was electrocuted when he accidentally touched certain exposed wires which he knew carried live current.

A very similar factual case came before the court in *Bus v Sydney City Council*.⁶ By this time, however, *McLean v Tedman*⁷ and *Bankstown Foundry Pty Ltd v Braistina*⁸ had been decided. The court stated at p90:

"Since the decision in *Dell'Oro*, the law has progressed by placing an increased emphasis upon the relevance of the possibility of negligence or inadvertence on the part of the person to whom the duty of care is owed. That possibility is now recognised as being relevant to the standard of care owed by an employer to an employee and as well generally in situations in which a duty of care exists."

Of course in the last three to four years, a trend has emerged whereby greater emphasis is given to the suggestion that people will take reasonable care for their own safety (see *Romeo v Conservation Commission (NT)*,⁹ *Ghantous v Hawkesbury City Council*,¹⁰ *Woods v Multi-Sport Holdings Pty Ltd*¹¹).

- 1 [2004] NSW CA 247.
- 2 *ibid* at [161] and [162].
- 3 [2003] NSWCA 61.
- 4 (1947) 75 CLR 339.
- 5 (1970) 132 CLR 97.
- 6 (1989) 167 CLR 78.
- 7 (1984) 155 CLR 306.
- 8 (1986) 160 CLR 301.
- 9 (1998) 192 CLR 431 at [123].
- 10 (2001) 206 CLR 512 at [163] and [355].
- 11 (2002) 76 ALJR 483 at [44].

In a frequently referred to statement, Heydon JA (as His Honour then was) said in *Van der Sluice v Display Craft Limited*:¹²

“The fact that the higher up the ladder one moves the more care one must take for one’s own safety is one of those simple facts affecting human existence in the physical world which adults in industrial societies have learned by the time, or indeed well before the time, they have become adults. It is a fact as fundamental, as elementary, as clear and as well known, as for example, the fact that it is dangerous to behave boisterously near pots cooking on stoves, the fact that broken glass needs to be carefully handled when picked up, the facts that rocks along the seashore can be slippery, the fact that shells in the sand of beaches can be sharp, and the fact that when moving about rubbish dumps one must bear in mind the possibility that rubbish may be lying there. There are matters which no adult need be told about and which any adult can be trusted to guard against the dangers of because it is part of the equipment of all normal adult human beings. All citizens can safely and reasonably assume that each normal adult human being acting autonomously and voluntarily will not incur unnecessary and blatantly obvious risks.”

Have these sentiments found any place in the principles applied to the employer/employee relationship? In *Czatycko v Edith Cowan University*¹³ the High Court considered the following facts. The plaintiff and another employee were required to load 30 or so boxes onto a truck for the purpose of removing them to another campus. The tray of the truck was fitted with an hydraulic lifting platform about the width of the truck. The platform sounded a loud noise when being raised and made a ‘clanging’ sound when it reached a point flush with the tray. It made no sound when being lowered.

The other employee performed the task of taking a trolley load of books onto the platform, caused the platform to be hydraulically lifted to a point flush with the tray and unloaded the books for the plaintiff to arrange. He then left the tray of the truck, descending on the platform with the trolley to gather another load. This system of loading the books was performed on a number of occasions.

On the last trip, the second employee left the truck without saying anything to the plaintiff. The plaintiff, who was reorganising the boxes, stepped backwards not realising that the lifting platform had moved and fell heavily. Had the platform been in place, he would not have fallen. The plaintiff succeeded at first instance, however, lost in the Full Court of the Supreme Court of Western Australia. There, Murray J stated:¹⁴

“In my opinion the appellant acting reasonably, was entitled to expect that the respondent would look where he was going rather than that he would step back, knowing that he was about to step off the back of the truck tray, without looking to see whether the hoist, which he knew was constantly on the move and which he knew he would not necessarily hear being lowered, was in fact in a position level with the tray of the truck.”

He referred also¹⁵ to the comments of Kirby J in *Romeo* where it was said:

“Where a risk is obvious to a person exercising

reasonable care for his or her own safety, the notion that the occupier must warn the entrant about that risk is neither reasonable nor just.”

Whilst there was reference to cases revolving around the liability of occupiers, there was no reference in the Full Court to any authority pertaining to the extent of the obligation imposed employers. The case was neither a warning case nor an occupier’s liability case. It was an employment case in which the central allegation against the employer was a failure to provide a safe system within the factual background of the plaintiff being required to perform repetitive and boring work. The High Court applied the usual principles found in the older cases (*Hamilton v Nuroof (WA) Pty Ltd*,¹⁶ *Smith v The Broken Hill Company Limited*¹⁷) and stated that:¹⁸

“Compliance by the respondent, as an employer, with its duty of care to an employee was not to be measured by reference to the reasonableness of imposing on an occupier of land an obligation to warn members of the public about the obvious risks on the land. The case for the appellant was not that he should have been warned by his employer that if he fell off the truck he might suffer injury, or whether if he stepped off the back of the truck into space he would fall. It was not a question of warning the appellant of a risk, it was a question of creating a risk by failing to adopt a safe system of work.”

3 Circumstances in which employers may succeed on liability

Czatycko shows that the many decisions of recent times in courts around the country which emphasise the need for a plaintiff to take care for his/her own safety as a pre-requisite to the establishment of liability in some circumstances have no application in the employment relationship over and above the long standing principles which have governed this area. Given the trend of authorities in the last 30 years or so outlined earlier, it is apparent that the circumstances in which employers shall succeed are extremely narrow in scope. The following classes represent an attempt to identify such areas.

(a) Where there is nothing further the employer could have done or provided in order to eliminate or minimise the risk

This proposition is demonstrated by *O’Connor v Commissioner for Government Transport*.¹⁹ There, an experienced plumber, employed by the defendant, fell through an awning affected by dry rot. He was directed to reduce the length of the awning which consisted of corrugated iron sheets. He was provided with a party of workers and tools with which to complete the job. Whilst he was standing on the awning, it collapsed under him due to the rot. There was obviously a foreseeable risk of injury to the deceased and there were precautions which could have been taken which would have eliminated the risk. The court held, however, that those precautions such as examination by a superior officer or some form of instruction to the plaintiff were all matters in respect of which it was not reasonable to expect the employer to perform or provide. Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ said:²⁰

“The defendant as employer was of course under a duty, by his servants and agents, to take rea-

12 [2002] NSWCA 404 at [74].

13 [2005] HCA 14.

14 [2002] WASCA 334 at [29].

15 *ibid* at [16].

16 (1956) 96 CLR 18 at p25.

17 (1957) 97 CLR 337 at p342.

18 *supra* at [14].

19 (1954) 100 CLR 225.

20 *ibid* at pp229-230.

sonable care for the safety of the deceased by providing proper and adequate means of carrying out his work without unnecessary risk, by warning him of unusual or unexpected risks, and by instructing him in the performance of his work where instructions might reasonably be thought to be required to secure him from danger of injury. But the party was provided with trestles and plank and nothing was wanting in tools or equipment. The deceased was experienced in his work. It was obvious that a question must exist whether the awning would bear his weight.

"The party sent down was as 'expert' or competent to judge of that simple subject as anybody that could reasonably be sent. . . . In such a simple matter who else should be left to judge? Does the reasonable care demanded of the employer require him to cause a scientific or other elaborate examination to be made of the strength of the structure lest the working plumber may decide to trust himself to it rather than work from a plank or trestle?"

" . . . The standard of care for an employee's safety is not a low one, but in a case such as this the question must be whether any suggested course that was omitted could really be regarded as reasonable (*my emphasis*). The case is not one of a defect in premises provided by the employer as the place where the employee is to do his work. The awning was the very thing to be worked at. . . . Obviously any experienced plumber would see that there must be a question whether a structure like the awning supported not by posts, but by brackets was strong enough to bear his weight as he dismantled it."

An example of the extent to which employers need go in order to satisfy the requisite standard of care is provided by *Bartley v Coles Myer Limited*.²¹ There, the unsuccessful plaintiff at trial was a butcher employed by the respondent. On two separate occasions he cut his left hand whilst boning and slicing meat with a sharp knife. It was alleged that the employer was negligent by failing to provide the plaintiff with a meshed glove to protect his hand and/or alternatively if it provided one it failed to supervise him properly in order to ensure that he wore the glove.

The first point failed; he had been provided with all necessary equipment, including gloves. The Court of Appeal focused upon whether the employer had exercised proper enforcement of the system of wearing gloves. The plaintiff was an experienced butcher. He had been trained without the use of gloves and carried on in his trade for many years without using them. He preferred not to wear them.

The plaintiff had been instructed by his superiors that he was expected to wear a glove and there were notices around his workplace carrying that instruction as well. He declined however to do so. The employer knew that the plaintiff was not complying with the direction and did not make any serious attempt to enforce the instruction until after the first accident. After the first accident, but before the second, the manager tried to enforce the safety rule. The manager's evidence was that the plaintiff refused to wear the glove and this led to arguments. The second accident then occurred which would have been averted with the wearing of the glove.

The Court of Appeal found that if suitable pressure

had been applied to the plaintiff he would have complied with the instruction rather than lose his job. Alternatively he would have been dismissed and would not have been injured in any event.

(b) Simple uncomplicated tasks

Glass McHugh & Douglas in their text 'The Liability of Employers in Damages for Personal Injury' (2nd edn. 1979) state:²²

"An area is marked out within which the employer's duty to provide a safe system of work is inoperative. It would appear that the immunity of the employer will be limited to isolated operations of no complexity outside the normal system or simple uncomplicated operations within it. It is not likely that the principle will undergo much further elucidation as scope for its operation is essentially a matter of degree depending on the nature of the industrial activity. The only unifying principle available is the power of the court to hold that on the evidence in the particular case it would be beyond all reason to find an employer in breach of duty for failure to take certain specified steps."

An example of a case where a plaintiff failed in his claim for damages by wrongly executing a simple uncomplicated procedure is *McLean's Roylen Cruises Pty Ltd v McEwan*.²³ There, the plaintiff was employed as a deckhand on a barge and was injured when his arm was crushed between the barge and a jetty. Although this was primarily a warning case, the High Court stated that it ought to have been obvious to anyone that there is a danger if a deckhand allows his arm to extend beyond the rail of the vessel that it may be caught between the vessel and the jetty when it is close to the jetty.

(c) Where the employee acts outside the scope of a duty of care owed to him or her by creating a risk of an unforeseeable character

An example of such a circumstance was *Jones v Persal*.²⁴ There, the plaintiff, whilst attempting to assist a co-worker fit a boom and bucket to a truck, climbed onto the truck's bullbar. This was a dangerous position to be in and he fell from the bullbar.

The trial judge found that it was foreseeable that the plaintiff may offer assistance and thereby subject himself to a risk of injury. He found that it was not necessary to go so far as to foresee the exact detail of that assistance such as climbing onto the bull bar. There were also safe means of performing the task which were not adopted by the plaintiff. The Court of Appeal held that the acts of the plaintiff, being outside his normal duties, and performed in circumstances in which there was an otherwise safe way to complete them, created a risk of an unforeseeable character.

4 Summary of the duties owed to a contractor in the context of the existence of obvious risks

(a) Introduction

The content or scope of any duty of care owed to a contractor is still the subject of debate. The starting point is *Stevens v Brodribb Sawmilling Company Pty Ltd*.²⁵

The Court of Appeal found that if suitable pressure had been applied to the plaintiff he would have complied with the instruction rather than lose his job. Alternatively he would have been dismissed and would not have been injured in any event.

²¹ [1994] QCA 427.

²² pp45-46.

²³ (1984) 54 ALR 3.

²⁴ [2000] QCA 386.

²⁵ (1986) 160 CLR 16.



There the plaintiff, a log carrier, was injured as a consequence of the negligence of a snigger who negligently loaded a log onto the plaintiff's truck. The three commonly repeated views expressed in the case are set out as follows.

Mason J said:²⁶

"If an entrepreneur engages independent contractors to do work which might as readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work and where there is a need for him to give directions as to when and where the work is to be done and to co-ordinate the various activities, there is an obligation to prescribe a safe system of work. The fact that they are not employees, or that he does not retain a right to control them in the manner in which they carry out their work, should not affect the existence of an obligation to prescribe a safe system. Brodribb's ability to prescribe such a system was not affected by its inability to direct the contractors as to how they should operate their machines."

Wilson & Dawson JJ said:²⁷

"... we are prepared to assume that [Brodribb] was under such a duty of care although it seems to us that the extent of the duty would have to take account of the independent functions of the contractors and be something less than that owed by an employer to his employees. To equate the duty with that owed by an employer to his employees would be to give no weight to the very circumstance which differentiates the contractors from employees... any such duty was, in effect, a duty to exercise care in the co-ordination of the activities of the various contractors."

Brennan J said:²⁸

"An entrepreneur who organises an activity involving a risk of injury to those engaged in it is under a duty to use reasonable care in organising the activity to avoid or minimise that risk, and that duty is imposed whether or not the entrepreneur is under a further duty of care to servants employed by him to carry out that activity. The entrepreneur's duty arises simply because he has created the risk (*my emphasis*) (*Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at p479) and his duty is more limited than the duty owed by an employer to an employee. The duty to use reasonable care in organising an activity does not import a duty to avoid any risk of injury; it imports a duty to use reasonable care to avoid unnecessary risks of injury and to minimise other risks of injury. It does not import a duty to retain control of working systems if it is reasonable to engage the services of independent contractors who are competent themselves to control their system of work without supervision by the entrepreneur. The circumstances may make it necessary for the entrepreneur to retain and exercise a supervisory power or to prescribe the respective areas of responsibility of independent contractors if confusion about those areas involves a risk of injury.

"But once the activity has been organised and its operation is in the hands of independent contractors, liability for negligence by them within the area of their responsibility is not borne vicariously by the entrepreneur. "If there is no failure

to take reasonable care in the employment of independent contractors competent to control their own systems of work, or in not retaining a supervisory power or in leaving undefined the contractor's respective areas of responsibility, the entrepreneur is not liable for damage caused merely by a negligent failure of an independent contractor to adopt or follow a safe system of work either within his area of responsibility or in an area of shared responsibility."

In *McDonnell v Hoffman*²⁹ (a case factually very similar to *Brodribb*), Chesterman J considered the above statements of principle and concluded that:

"The most comprehensive discussion of the principle underlying the imposition of duty on one who engages a contractor is found in the judgment of Brennan J. The essence of it seems to lie in the organisation of an activity which carries a risk of injury. The activity is to be organised with reasonable care to avoid risk of injury. A builder who engages a plumber and an electrician to work on the same site at the same time must take reasonable care that each can work without harm from the other. Beyond this sort of consideration the duty appears to have no scope for operation."

That decision can be contrasted with the remarks of Ipp JA (who whom Mason P & McColl JA agreed) in *Rockdale Beef Pty Ltd v Carey*³⁰ where he stated:

"In my opinion, nothing said by Mason J or Brennan J in *Stevens*, or Heydon JA in *Kolodziejczyk*, prevents the general law of negligence imposing on an entrepreneur a duty of care owed to an independent contractor. Such a duty may arise in circumstances where there is no need for the entrepreneur to give directions as to when and where the work is to be done and to co-ordinate the various activities, but where, for other reasons, reasonable care on the part of the entrepreneur affects the way in which the work is to be undertaken and the safety of the worksite, and where other consideration (not applicable in *Stevens* & *Kolodziejczyk*) such as vulnerability, inequality of bargaining power, control, and the other manifold factors that the law recognises as being relevant to the existence of a duty of care, are present." (*my emphasis*)

(b) Cases where the contractor has failed to establish liability

In *Van der Sluice v Display Craft Pty Ltd*³¹ the plaintiff fell from the ladder upon which he was standing whilst installing Christmas decorations as an independent contractor for the defendant. The master dismissed the claims and the plaintiff appealed to the New South Wales Court of Appeal.

This was plainly a case involving a genuine independent contractor who was engaged for a particular purpose of installing and dismantling Christmas decorations at various locations. As Gleeson CJ described it in the special leave application, it was a seasonal business.

Now in the context of this factual background, it is submitted that, as a permitted entrant on the defendant's premises, whilst there was a duty on the principal to do what was reasonable to avoid a foreseeable risk of injury to the contractor, the scope or measure of that duty would have been very limited indeed.

26 *ibid* at p31.

27 *ibid* at p45.

28 *ibid* at pp47-48.

29 [2000] QSC 54 at [25].

30 [2003] NSWCA 132 at [84].

31 [2002] NSW CA 204.

The important feature of this case, however, is that the New South Wales Court of Appeal upheld the master's view that the risk of injury was not foreseeable.³² This is a finding which would appear to be contrary to binding authority. As Kirby J stated in *Douvro Pty Ltd v Wilkins*:³³

"It has sometimes been argued that the decision of the Privy Council in *The Wagon Mound [No.2]* [1967] 1 AC 617 resulted in a wrong turning of the law of negligence. Instead of asking what was 'liable to happen' in the sense that 'it was not unlikely to happen' (as some Judges suggested), their Lordships in *Wagon Mound* embraced what has been described as the 'undemanding' test of reasonable foreseeability. By that test, it is sufficient that a reasonable person in the defendant's position would have foreseen that its conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. It remains, if this question is answered in the affirmative, to decide what a reasonable person would then have done by way of response to such risk. However, the risk is posed at a general level of possibility and in terms of risk of harm. It is not posed in terms of the likelihood of the particular harm that allegedly occurred. There is a reason for this. The duty which the law of negligence invokes is concerned with securing a response to a risk of harm generally. It does not demand exact prescience, so that the putative tortfeasor will be expected to see into the future and predict a specific way in which events will work out."

The plaintiff failed on questions of breach as well as duty in *Van der Sluice* and he was always going to be unlikely to succeed on the breach issue. However, in the special leave application, whilst the plaintiff was unsuccessful in obtaining leave, both Gleeson CJ and Kirby J expressed reservation with the reasoning of the Court of Appeal on this point, but saw little reason in giving special leave where the appeal would have otherwise failed (on the breach issue).

It is in the context of the finding that the risk of injury was not reasonably foreseeable that Heydon JA made the oft-quoted remarks that care needs to be taken when moving about a rubbish dump, that shells in the sand of beaches can be sharp, and that rocks along the seashore can be slippery. Heydon JA refers to *O'Connor v Commissioner for Government Transport* in support of his position. However, that was not concerned with issues of foreseeability on the issue of duty. It was concerned with the scope of the duty of care which an employer owed to the plaintiff. It was concerned with what further steps could reasonably have been expected of the employer so that a risk of injury of the kind suffered could have been eliminated or minimised.

In *Kolodziegczyk v Grandview Pty Ltd*,³⁴ the plaintiff and his business partner worked for the defendant as sub-contractors for the purpose of installing roof cladding on houses. The plaintiff fell from an unsecured ladder whilst performing these tasks which was leaning against a house on which he was installing the cladding.

The plaintiff was unsuccessful in establishing either duty, breach or causation. The court took a narrow view of *Stevens* and stated that the duty arises in cases "only where there is a need for directions to be

given as to when and where work is to be done and for the co-ordination of various activities".³⁵

The court found, even if there was a duty, that had not been breached because of the plaintiff's failure to tie the ladder at the top and bottom. Heydon JA said:³⁶

"The objective circumstances of the plaintiff's position largely known to the defendant, meant that the defendants assumed the duty of care was not breached either by the non-provision of better scaffolding or the failure to supply rope and instructions about how to use it. The danger was the reverse of hidden. It was actually apparent to the plaintiff. The Trial Judge found that he spoke of that danger to the defendant. Particularly in view of the plaintiff's experience the need to behave with an eye to safety was so plain, and the measures to be adopted which would achieve safety were so simple, that the defendant was not in breach of duty. The defendant was entitled to trust the plaintiff to make appropriate provision for his own safety."

Even in the event of the establishment of duty and breach, the court found that the plaintiff would have failed on causation in any event, as the cause of the fall was found to have been the plaintiff's failure to have tied the ladder.

In *Pack-Tainers Pty Ltd v Moore*³⁷ the plaintiff was a contractor who was a qualified fitter and machinist who had special training in respect of the maintenance of container carriers and forklifts. He operated the business of maintaining container carriers and associated equipment including forklift trucks. He was injured while working at the defendant's premises when trying to solve a problem whereby one container would not disengage from a forklift.

In order to attempt to solve the issue, the plaintiff made his way onto the top of the container which was about three metres above ground level and slipped and fell.

Young CJ specifically remarked that this was not a '*Brodribb*' set of facts and stated:³⁸

"The situations where the relevant duty may attach are not limited to cases which fit within the facts of *Brodribb*."

In circumstances in which there was no evidence that the principal (if asked) would not have provided some form of equipment to assist the plaintiff to safely complete the task and there was evidence that the plaintiff was expected to seek the help of the principal's employees, the defendant was found to have taken all reasonable steps in the circumstances to avoid or minimise the risk of injury.

(c) Cases where the contractor has been successful in establishing liability

In *Hoekstra v Residual Assco Industries Pty Ltd*³⁹ an employee was sent to the premises of a third party to perform work and was injured when he fell whilst descending a ladder after steel plates which were supposed to be at the foot of the ladder were removed. This case does not involve a contractor, however there are interesting statements of principle in it which are relevant when discussing *Thompson v Woolworths*⁴⁰ (considered later). Counsel for the defendant submitted that no duty of care was owed to the plaintiff because the plaintiff was not acting with reasonable care for his own safety.

³² see [74].

³³ [2003] HCA 51 at para. [104].

³⁴ [2002] NSWCA 267.

³⁵ *ibid* [53].

³⁶ *ibid* [52].

³⁷ [2005] NSWCA 43.

³⁸ *ibid* [77].

³⁹ [2004] NSW SC 564.

⁴⁰ [2005] HCA 19.



It was submitted that, in the case of a defendant who was not an employer, a duty of care arises only to those persons who are at the time, exercising reasonable care for their own safety.

Dunford J found this suggestion “novel and surprising”. *Van der Sluice* was one of the cases relied upon in support of that proposition. Dunford J said:⁴¹

“... A duty of care may be owed notwithstanding a failure of the other person to take reasonable care for his or her own safety. . . . To hold otherwise, i.e., that there is no duty of care owed to those who failed to take reasonable care for their own safety, would have the effect of making contributory negligence an absolute defence to actions of negligence and negate the provisions of the apportionment legislation . . .”

In *Surf Coast Shire Council v Webb*,⁴² the Victorian Court of Appeal considered the following circumstances. The plaintiff and his wife were proprietors of a small business and had entered into a contract with the defendant shire to collect rubbish from a number of public bins located throughout the shire. The bins had no handles or protruding parts which could be easily grasped, so that they could only be lifted by being taken by a thin outer lip. When full, considerable effort was required to remove them from the cradle in which they sat. Sometimes the bottom of the bin became jammed into the base of the cradle.

One of the bins which the plaintiff was required to empty was opposite a shop. It seems that rubbish from the shop was placed into the bin and there was a much greater effort involved in lifting that bin than others. On the day in question, the plaintiff sought to lift the heavy bin out of its cradle but found that it was jammed into the base of the stand. The plaintiff gave the bin a “violent jerk” and he suffered an injury.

It was alleged that the shire breached its duty and failed to prevent the dumping of commercial rubbish in excessive quantities in the bins and failed to provide suitable or appropriately designed bins.

Chernov JA who gave the judgment of the court accepted that the ambit of any duty owed was narrower than that owed by an employer to an employee. There was some evidence that a simple method of fitting the bins with lids which limited the size and amount of rubbish which could be placed in them would have alleviated this risk. Chernov JA considered the submission that the plaintiff was in a good position to assess the risk involved in lifting a heavy bin when it was jammed and to protect himself against the possibility of injury by seeking assistance. He stated, however, that that went to the question of contribution and found the defendant liable.

In *Thompson v Woolworths*⁴³ the plaintiff and her husband owned and conducted a bread delivery service in the course of which they made daily deliveries to the local Woolworths store. Deliveries were made to a loading dock at the end of a lane. The loading dock led to a storeroom which was under the control of a storeman and there were roller doors between the loading dock and the storeroom. The system was that suppliers of goods would reverse the truck along the laneway and unload the goods onto the loading dock from where they were taken to the storeroom.

The presence of the storeman was necessary once the truck reached the loading dock, obviously for the purpose of invoicing goods and determining the correct quantity and so forth. When the storeman was not present, it was necessary to press a buzzer to attract his attention and bring him to the loading dock. The evidence was that on some occasions it took up to 10 or 15 minutes for the storeman to arrive. The plaintiff was unable to unload her bread and continue on to perform her other deliveries without the assistance of the storeman.

In an area adjacent to the loading dock, two industrial waste bins were located. The waste bins were usually placed alongside the loading dock. Upon them being emptied by the local council, the council workers would regularly leave the empty bins in the laneway in front of the loading dock without returning them to the position where they ordinarily stood. The presence of the bins in front of the dock effectively prevented delivery vehicles from obtaining access to it.

The trial judge found as a fact that it was the responsibility of the defendant to move the bins. He found that the defendant’s employees were aware that the bins constituted an obstacle and also that drivers often moved the bins.

The advantage of moving the bins for the delivery driver was that it saved some amount of time and allowed that person to go on their way to complete further deliveries. However, the time saved by moving the bins must have been not significant, as the delivery driver had to wait for the storeman in any event to permit the actual delivery to occur on the loading dock.

Prior to being injured, the plaintiff and her husband complained to the defendant’s staff and management about the bins being left in the laneway. Shortly prior to the accident the plaintiff wrote in her diary “too heavy for manual moving . . . too heavy for me to move by myself”. Over the 18 months or so prior to the accident, the plaintiff moved the bins between 20 and 30 times. A week or two prior to her injury, she was attempting to lift a crate of bread and injured her back.

On the relevant day, the plaintiff arrived at the defendant’s premises and no other person was present. There were empty waste bins in front of the loading dock. The plaintiff reversed the truck along the laneway and then after leaving the truck attempted to move one of the bins. During this episode, she was injured.

Samios DCJ found for the plaintiff on the basis that there was a failure to provide a safe system in circumstances in where the defendant knew that the bins represented an obstacle for the delivery drivers, and that they knew that the drivers would often move the bins. He found that there was evidence which demonstrated that there were measures, not expensive or difficult to implement, which would have changed the system and alleviated the risk.

The defendant successfully appealed to the Queensland Court of Appeal.⁴⁴ The Chief Justice found that, while the risk of the plaintiff injuring herself was obvious, this did not bear upon the existence of a duty itself, but on the formulation of the content of the duty. He referred to the relationship between the parties, the obviousness of the risk and the undertaking of the risky manoeuvre as being im-

⁴¹ *supra* [35].

⁴² [2003] VSCA 162.

⁴³ [2005] HCA 19.

⁴⁴ *Woolworths v Thompson* [2003] QCA 551.

portant elements in the formulation of that content. In his view, the duty owed to the plaintiff did not extend to taking steps to eliminate this risk.

Williams JA focused primarily upon the obviousness of the risk, given the plaintiff's knowledge of the weight of the bins, as well as her previous injury. He referred to her statement under cross-examination where she stated that "it was obvious to me that I shouldn't have pushed the bins".

McMurdo J dissented. He referred to the majority judgment in *Nagel*⁴⁵ where it was stated:

"We are left in no doubt that the trial Judge was correct in concluding that the risk of injury to those diving from the rock ledge was reasonably foreseeable. As he said 'it may have reasonably been considered foolhardy or unlikely' for a person to dive as the appellant did, but as he recognised, that was not the relevant question: a risk may constitute a foreseeable risk even though it is unlikely to occur. It is enough that the risk is not far fetched or fanciful."

McMurdo J referred to the fact that the majority in the High Court dismissed the appeal in *Romeo*, not because a duty of care was not owed, but because it was not breached. He stated:

"Toohey & Gummow JJ remarked that 'the risk existed only in the case of someone ignoring the obvious' but added:

"In putting the matter in that way, there is a danger of drawing in the question of contributory negligence of the plaintiff to what is a consideration of the duty of care on the defendant. For that reason we think it is preferable to approach the matter on the footing that there was a duty of care on the respondent to take any steps that were reasonable to prevent the foreseeable risk becoming an actuality."

"Kirby J & Hayne J each distinguished between the issue of whether a duty of care existed and the issue involving what was alternatively described as the measure, scope or content of that duty. The obviousness of the danger presented by the cliff was relevant to the second of those issues: see pp488-489 where Hayne J said:

"What is reasonable must be judged in the light of all the circumstances. Usually the gravity of the injury that might be sustained, the likelihood of such an injury occurring and the difficulty in cost of averting the danger will loom large in that consideration. But it is not only those factors that may bear upon the question. In the case of a public authority which manages public lands, it may or may not be able to control entry on the land in the same way that a private owner may: it may have responsibility for an area of wilderness far removed from the nearest town or village or an area of carefully manicured park in the middle of a capital city; it may positively encourage, or at least know of, use of the land only by the fit and adventurous or by those of all ages and conditions. All of these matters may bear upon what the reasonable response of the authority may be to the fact that injury is reasonably foreseeable. Similarly, it may be necessary, in a particular case, to consider whether the danger was hidden or obvious, or to consider whether it could be avoided by the exercise of the degree

of care ordinarily exercised by a member of the public or to consider whether the danger is one created by the action of the authority or is naturally occurring. But all of these matters (and I am not to be taken as giving some exhaustive list) are no more than particular factors which go towards judging what reasonable care on the part of a particular defendant required. In the end that question, what is reasonable, is a question of fact to be judged in all of the circumstances of the case.'"

McMurdo J also dealt with arguments advanced by the defendant which, it was argued, pointed towards comments in cases such as *Brody* supporting the proposition that no duty is owed in respect of an obvious risk. He found (like the members of the majority) that the defendant owed a duty to do what was reasonable to avoid the risk of injury in her movement of the bins whilst unassisted. He disagreed however with the majority on the basis that the content of the duty did extend to cover this particular risk, albeit obvious.

The plaintiff obtained special leave and was successful in the High Court. The High Court agreed with the reasoning of McMurdo J and said:⁴⁶

"When a person is required to take reasonable care to avoid a risk of harm to another, the weight to be given to the expectation that the other will exercise reasonable care for their own safety is a matter of factual judgment. . . . The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response. . . . The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an inter-play of considerations. The weight to be given to any one of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. . . . The question was whether the respondent had a proper delivery system in place. Such a system should have included arrangements for moving the waste bins left in the laneway by the council workers in order to clear access to the loading dock. The [plaintiff] and other delivery drivers had no responsibility to design, and no power to implement, the delivery system operating on the respondent's premises." (*my emphasis*)

It is submitted that the difference in views in this case represents one of those circumstances upon which reasonable minds may differ, particularly in light of the fact that it was likely that the actions of the plaintiff in moving the bin resulted in little saving of time.

It is submitted that the reasoning in the Court of Appeal and the High Court demonstrates a number of points.

It is submitted that the difference in views in this case represents one of those circumstances upon which reasonable minds may differ, particularly in light of the fact that it was likely that the actions of the plaintiff in moving the bin resulted in little saving of time.

⁴⁵ supra at pp430-431.

⁴⁶ supra [35] to [38].



First, each decision shows that the proposition that there can be no duty owed in respect of a foreseeable but obvious risk is incorrect.

Second, each decision must also demonstrate that the finding that the risk of injury in *Van der Sluice* was not foreseeable is incorrect. If the risk of injury to Mrs Thompson was foreseeable in circumstances in which she voluntarily moved a heavy industrial bin, how can the risk of injury (by falling off a ladder) to a contractor who was engaged to install Christmas decorations not be foreseeable?

Third, the decision of the High Court rests upon the failure to have in place a proper delivery system⁴⁷ and the inability of the plaintiff to 'implement' or 'design' such a system. In that regard, there appears to be some convergence of principle with that put forward by Ipp J in *Rockdale Beef*. There, a factor which was said to be particularly relevant to the imposition of a duty on a principal to a contractor was the plaintiff's inability to protect himself from injury by way of the configuration of the worksite, that is, the plaintiff was vulnerable to a risk of injury over which he had no control.

5 The application of the Civil Liability Act 2003

The above discussion has hitherto excluded a consideration of this legislation. The first thing to note is that the Act will have no application to conventional employer/employee relationships. Section 5 of the *Civil Liability Act* states:

5 Civil liability excluded from Act

This Act does not apply in relation to any civil claim for damages for personal injury if the harm resulting from the breach of duty owed to the claimant is or includes—

- (a) an injury as defined under the WorkCover Queensland Act 1996, other than an injury to which section 36(1)(c) or 371 of that Act applies; or

Example for paragraph (a)—

A worker employed under a contract of service with a labour hire company is injured at the premises of a host employer while driving a defective machine. The worker pursues claims for damages for civil liability against the labour hire company, the host employer and the manufacturer of the machine. The worker suffers a number of injuries but only 1 of them is accepted as an injury under the WorkCover Queensland Act 1996, section 34. This Act does not apply to any of the claims for damages.

- (b) an injury as defined under the Workers' Compensation and Rehabilitation Act 2003, other than an injury to which section 34(1)(c) or 352 of that Act applies; or
- (c) an injury that is a dust-related condition; or
- (d) an injury resulting from smoking or other use of tobacco products or exposure to tobacco smoke.

Section 32 *Workers' Compensation and Rehabilitation Act 2003* relevantly states:

"32(1) An "injury" is personal injury arising out of, or in the course of, employment if the employment is the major significant factor causing the injury."

It can also be seen from Schedule 2 Part 1 *Workers' Compensation and Rehabilitation Act* that a person performing work under a contract is employed by an

employer (and may thus suffer an injury within the meaning of the Act) unless he or she:

- (i) is paid to achieve a specified result or outcome; and
- (ii) has to supply the plant and equipment or tools of trade needed to perform the work; and
- (iii) is, or would be, liable for the cost of rectifying any defect in the work performed.

It is not proposed to conduct a wide-ranging overview in respect of the effect of the entire *Civil Liability Act* on such cases, however, for present purposes, the relevant sections are set out as follows:

"General Principles

9 (1) A person does not breach a duty to take precautions against a risk of harm unless—

- (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
- (b) the risk was not insignificant; and
- (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.

(2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things)—

- (a) the probability that the harm would occur if care were not taken;
- (b) the likely seriousness of the harm;
- (c) the burden of taking precautions to avoid the risk of harm;
- (d) the social utility of the activity that creates the risk of harm."

"Meaning of 'obvious risk'

13 (1) For this division, an 'obvious risk' to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person.

(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 circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

(5) To remove any doubt, it is declared that a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless the failure itself is an obvious risk."

"Persons suffering harm presumed to be aware of obvious risks

14 (1) If in an action for damages for breach of duty causing harm, a defence of voluntary assumption of risk is raised by the defendant, and the risk is an obvious risk, the plaintiff is taken to have been aware of the risk unless the plaintiff proves, on the balance of probabilities, that he or she was not aware of the risk.

(2) For this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk."

After ascertaining whether or not the legislation applies, the next thing to note about the sections

47 see [36].

dealing with obvious risks is that whilst section 15 prescribes that a duty is not owed to another person to warn of an obvious risk and section 19 declares that a person is not liable in negligence for harm suffered by another as a result of the materialisation of an obvious risk of a dangerous recreational activity, the position is different in respect of other activities where an obvious risk is taken.

A person may still succeed despite engaging in conduct which involves an obvious risk (not being activities referred to in sections 15 or 19) subject to the statutory form of voluntary assumption of risk encapsulated in s14. Therefore, whilst there is a denial of the establishment of liability in respect of recreational activities and warning cases in respect of obvious risks, other situations are left to the common law subject to the application of s14.

It can be seen that there are two major changes to the common law concept of voluntary assumption of risk. First, the plaintiff need only be aware of the "type or kind of risk even if [he] is not aware of the precise, nature, extent or manner of occurrence of the risk". Contrast this to the common law position where there needs to be a full appreciation of the precise risk before the defence can apply. Second, the onus of proving the awareness of the risk is reversed; it now lies on the plaintiff to establish that he or she was not aware of the risk.

In the context of this background, it is submitted that the plaintiffs in both *Surf Coast Shire Council* and *Thompson* would not have suffered an "injury" within the meaning of the *Workers' Compensation and Rehabilitation Act*. Each plaintiff was an independent contractor who would have fallen within the three conjunctive categories of Schedule 2 of that Act. The *Civil Liability Act* would have applied. Using these authorities as examples, would the *Civil Liability Act* have made a difference to the outcome of either case?

It is submitted that a volenti defence may well have been raised in *Surf Coast Shire Council* in that the plaintiff may be found to have been aware of the type or kind of risk to him in circumstances in which he lifted the bin out of the cradle. It is worth noting that the test in section 14(1) is subjective. Compare this to section 13(1) which defines an obvious risk as one which would have been obvious to a reasonable person in the position of the plaintiff.

The plaintiff in *Thompson* would certainly have had to deal with greater difficulties than the substantial ones which she did encounter. The plaintiff would have had to have proved that she was not aware of the general risk of injury to her back in circumstances in which she has previously diarised that the bins were too heavy for her and in circumstances in which she had injured her back, only a matter of weeks earlier. This would have been a difficult hurdle for her to overcome.

The concept of voluntariness, however, is still present. In *Suncorp Insurance and Finance v Blakeney*,⁴⁸ Pincus JA stated:

"... the definition of the volenti defence accepted in *Roggenkamp v Bennett* (1950) 80 CLR 292 at 300 places a heavier burden on a defendant in a case of this sort. McTiernan and Williams JJ held that the elements of a defence of a defence of volenti non fit injuria were conveniently stated in the then current edition of

Halsbury:

'In order to establish the defence, the plaintiff must be shown not only to have perceived the existence of danger, for this alone would be insufficient, but also that he fully appreciated it and voluntarily accepted the risk'."

The trend of modern authorities is that there must be an "absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will".⁴⁹ In other words, if for example the evidence in *Thompson* had been that the plaintiff would have suffered some form of genuine economic harm had she not moved the bin, it could legitimately be argued that the act of moving the bin was not a voluntary one. She may perhaps have been able to lead some evidence on this issue.

Similar remarks apply to the plaintiff in *Surf Coast Shire Council*. Section 14 makes no reference to the party who bears the onus of proof on this issue. It can be safely said then that such onus of proving voluntariness lies on the defendant. It is submitted therefore, that in circumstances in which a plaintiff is unable to prove that he or she was not aware of the risk, a plaintiff will defeat the volenti defence, as altered by section 14, unless the defendant is able to establish voluntariness.

6 Conclusion

The manner of dealing with circumstances in which it is argued that people ought to take greater care for their own safety in the context of workplace incidents has generally been thought to contain fairly well settled principles in the employer/employee relationship. Despite that, the matter has recently been dealt with by the High Court where the only issue was the provision of a safe system.

In respect of contractors, it is submitted that a theme can be detected. In circumstances in which a plaintiff finds himself or herself in a dangerous or unsafe situation as a consequence of the system which he or she is required to work within, it appears that there will be a significantly greater chance of a plaintiff establishing a relevant duty owed to him or her (see *Rockdale Beef* and *Thompson*). An example of the inverse of this proposition is *Pack-Tainers Pty Ltd* where there was adequate scope for the plaintiff to control the system within which he was required to work.

In those circumstances, it is submitted that the views of the High Court in *Thompson* are consistent with the statements of Ipp JA in *Rockdale Beef* and Young CJ in *Pack-Tainers Pty Ltd* and inconsistent with the narrow interpretation of the duty owed to an independent contractor. It must be doubted whether the High Court in *Brodribb* ever intended to prescribe such a narrow formulation for general application to contractors. Apart from any argument in respect of the vicarious liability of the principal because of the negligence of the snigger, the factual background necessarily made for the formulation of a narrow duty of care.

Indeed, the judgment of Brennan J refers to the entrepreneur's duty arising "because he has created the risk". It would be odd then if a duty was denied in circumstances in which an entrepreneur created a risk but simply in a different way.

⁴⁸ (1993) Aust Torts Reports 81-253 at 62,648.

⁴⁹ *Bowater v Rowley Regis Corp* [1944] KB 476 at p.479 per Scott LJ.



By defining the scope of the duty in a narrow fashion, a contractor who does not depend upon the safe organisation of activities between contractors, but does depend upon a safe system being in place, would fail in a situation in which there is no relevant aspect of the former circumstance present, but as to the latter, is required to work in an unsafe system over which he has little or no control.

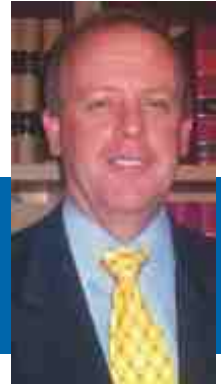
It is difficult to see how the plaintiff in *McDonnell v Hoffman* could have succeeded; Chesterman J in fact remarked that the debate as to whether the plaintiff was an employee or a contractor made no difference to the decision. There, the plaintiff, an experienced tree feller, elected to commence work alone without his co-worker and, because of the way in which he approached his task, was injured. The only allegation of negligence that was advanced was a failure to provide a safe system in circumstances in which the injury was caused by the plaintiff's own misjudgment of a situation.

In *Brodribb*, the only way in which the plaintiff could have succeeded against his principal was to allege the duty which ultimately was found to exist (although of course the breach was not proved). In neither *Brodribb* nor *Hoffman* was there any unsafe system present which placed the plaintiff in a vulnerable position.

It is submitted that contractors who fall outside the scope of the *Civil Liability Act* will in many circumstances be in relationships with their principals which shall be very close to employment. This is because where a contractor:

- (i) is paid to achieve a specified result or outcome; and
- (ii) has to supply the plant and equipment or tools of trade needed to perform the work; and
- (iii) is, or would be, liable for the cost of rectifying

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any defect in the work performed;

he or she will not be a "worker" within the meaning of the *Workers' Compensation and Rehabilitation Act 2003*; will not be able to suffer an "injury"; and will therefore fall outside the *Civil Liability Act*. It is submitted that contractors who fall outside the Act therefore will be more likely to face situations where they face risks because of an unsafe system to which they may be vulnerable and have no control over, and that those situations shall more readily fall within a factual scenario like *Rockdale Beef*.

The difficulty for contractors arises not necessarily because of the effect which the *Civil Liability Act* ought to have on claims but because of the type of contractor generally included in its operation.

Those contractors who fall within the application of the *Civil Liability Act* will, generally speaking, be more truly 'independent' and therefore more likely to be in a position to exert more control over their work systems. There is the prospect of an absolute defence here, however the issue of voluntariness shall loom large as it has under the common law.*