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PRINCIPLES-BASED REFORM OF THE LAW OF NEGLIGENCE: NOT AS EASY AS IT SOUNDS?

MARK LUNNEY*

Many of the concerns of the tort reform lobby in Australia related to liability in respect to recreational activities. These concerns prompted the Ipp Panel, charged with the task of making suggestions for principles-based reform of the law of negligence, to recommend that legislation should be enacted to restrict claims by those involved in certain types of recreational activity.[1] Although the Ipp Panel made clear that its recommendations were a set of guiding principles rather than legislative language, the recommendations in this area formed the basis of statutory provisions in a number of Australian jurisdictions.[2] *Fallas v Mourlas*[3] provided the first opportunity, in the context of the New South Wales legislation, for an appellate court to consider the meaning of these provisions.[4]

Messers Fallas and Mourlas were members of a group of four men from Sydney who went to the country to engage in the sport of shooting kangaroos. After meeting at a local hotel they had a

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* Associate Professor of Law, University of New England

1 *Review of the Law of Negligence* (Final Report) September 2002 ('Ipp Report') paras 4.20–24.

2 *Civil Liability Act 2002* (NSW) s 5L; *Civil Liability Act 2003* (Qld) 2003 s 19; *Civil Liability Act 2002* (Tas) s 20; *Civil Liability Act 2002* (WA) s 5H. Academic commentators have already noted the potential scope of these provisions: see for example Underwood, "Is Mrs Donoghue's Snail in Mortal Peril?" (2004) 12 *TLJ* 39; Healey, "Civil Liability: A New Game for Sport" (2004) 1(2) *C*L 20; Dietrich, "Duty of Care Under the Civil Liability Acts" (2005) 13 TLJ 17; Keeler, "Personal responsibility and the reforms recommended by the Ipp Report: 'Time future contained in time past'" (2006) 14 *TLJ* 48.

3 [2006] NSWCA 32.

4 Two weeks earlier, in *Falvo v Australian Oztag Sports Association* [2006] NSWCA 17, the Court of Appeal did consider the meaning of 'dangerous recreational activity' but the meaning of the section as a whole was not considered.

meal and some alcohol, although it was held that the events that later unfolded had nothing to do with the state of sobriety of the parties. It was then decided, around 10.00pm, to do some kangaroo shooting. The group drove out to an area where kangaroos were expected whereupon the plaintiff, Mourlas, agreed to 'spotlight' – to hold an external light so that the areas surrounding the vehicles were illuminated – for the group. Two of the group were already shooting (apparently unsuccessfully) when the defendant, Fallas, left the car to join them. After a period, during which time the plaintiff continued to spotlight, the defendant came back to the car. The plaintiff told him to make sure the handgun he was holding was empty, and the defendant assured him it was alright and entered the car. The plaintiff then told him not to point the gun in his direction and to take the gun outside but the defendant continued to insist that the gun was safe and that he knew what he was doing. The plaintiff's attention was then drawn to the other members of the group outside the car, but shortly thereafter he noticed that the defendant was 'playing with the gun' because, according to the defendant, it was jammed. He again told the defendant to do it outside. A short time later the gun accidentally discharged and the plaintiff was shot in the leg. An action for negligence was successful at first instance, and the only issue before the Court of Appeal was whether the judge had been correct to find that s5L of the *Civil Liability Act 2002* (NSW), a provision based on the Ipp Panel's recommendations discussed above, did not apply. Section 5L provided a defence to an action of negligence where the injury to the plaintiff was the result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.

By a 2–1 majority, the Court of Appeal dismissed the appeal. However, as none of the judges agree entirely with each other, it is necessary to consider individual issues to determine what, if any, is the majority view. The first question for the court was whether the plaintiff 'engaged' in a dangerous recreational activity. Although it was accepted that kangaroo shooting at night was a recreational activity, the more difficult question was whether the plaintiff's level of engagement with the activity was relevant to determining whether it was a 'dangerous' recreational activity. Ipp & Tobias JJA, and probably Basten JA, held that it was; whether the activity was dangerous depended upon 'the particular activities engaged in by the plaintiff at the relevant time', the time being the time of the accident. Here, the plaintiff's engagement involved holding the spotlight, not

shooting, and it was this limited involvement in the activity that had to be evaluated rather than determining the activities ordinarily engaged in by participants of that activity and deciding whether those activities constituted a dangerous recreational activity. The decision to import a subjective element into this enquiry is welcome. As Ipp JA noted, the circumstances surrounding a person's engagement in an activity might well make it more or less dangerous than the average. A cricketer going out to bat whilst inebriated might well engage in a dangerous recreational activity but a sober batsman might not. Thus in *Fallas*, holding the spotlight may have given rise to a lower level of risk than being involved in the actual shooting. The subjective enquiry thus recognises that there are a number of ways in which one might engage in an activity each of which will carry a different level of risk. For example, a referee of a game of rugby is clearly engaged in the game of rugby[5] – the game cannot take place without him or her – but the risks associated with this type of engagement are clearly different from those of the players. On this approach, however, there may be a fine line between saying that the plaintiff was not engaged in the activity and saying that the nature of the plaintiff's engagement limited the risks involved. Although this distinction will usually be unimportant, it will not always be so. A plaintiff who is not engaging in the activity cannot have s 5L pleaded against him, but as long as a plaintiff is engaging in the activity, it is open for a court to find that the level of risk associated with the engagement is sufficient for the activity to be a dangerous recreational activity.

Once the plaintiff's level of engagement with the activity has been determined, the next question is whether it constitutes an engagement in a dangerous recreational activity – in News South Wales, defined as one that carries with it a significant risk of physical harm. All three members of the Court of Appeal interpreted the expression as a whole, so that in determining the level of risk associated with the activity, both the probability of the risk occurring and the severity of the injury if the risk materialised had to be evaluated[6]. Put simply, the more severe

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5 This was also the view of the Ipp Report, para 4.13.

6 This was the approach of Ipp JA in *Falvo v Australian Oztag Sports Association* [2006] NSWCA 17, and of the Court of Appeal in the later case

the injury suffered if the risk materialised, the lower the level of probability of it occurring that was necessary to make the risk 'significant'. The 'balancing' approach adopted by the court reflects the view of the Ipp Panel that the kinds of activity caught by its recommendation would be those where some of the enjoyment from engaging in the activity derived from risk-taking. This was reflected in the report by limiting the recommendation to activities that carried a 'significant degree of physical risk'. This expression draws explicit attention to the serious of the harm that follows from the risk materialising as a key factor in characterising the activity as dangerous. Unfortunately, none of the jurisdictions that introduced legislation providing a defence for those engaged in dangerous recreational activities used this language: in New South Wales the expression is 'significant risk of physical harm', in Queensland and Tasmania it is a 'significant degree of risk of physical harm' and Western Australia uses 'significant risk of harm'. That said, it seems likely that the interpretation adopted by the court reflects the aim of the legislature in New South Wales in passing the legislation.[7] It would be possible to interpret

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of *Lormine Pty Ltd v Xuereb* [2006] NSWCA 200. In *Lormine* it was held that the plaintiff is entitled to have regard to the safety of the activity judged by reference to how the defendant represented the activity to the plaintiff. Thus the defendant, who had represented that the dolphin-watching cruises it ran were in 'calm water', could not plead s 5L as a defence; the activity as represented was not a dangerous recreational activity.

7 Although there is nothing in the Explanatory Notes or in the speech of the Premier introducing the bill for its second reading which aids directly in understanding the meaning of the section, it is clear that most of the legislation implemented or drew on the recommendations in the Ipp Report. Some speakers during the debate on the Civil Liability Amendment (Personal Responsibility) Bill 2002 also made a distinction between dangerous and non-dangerous recreational activities (e.g. New South Wales, *Parliamentary Debates*, Legislative Council, 19 November 2002, 6896 (Michael Egan); New South Wales, *Parliamentary Debates*, Legislative Council, 19 November 2002, 6924 (John Hatzistergos)). This distinction had not been made in the Ipp Report, where the only limitation on liability was for recreational activities involving a significant degree of physical risk, but was necessary under the Civil Liability Amendment (Personal Responsibility) Bill 2002 as separate defences were created for dangerous and non-dangerous recreational activities. This change from the Ipp Report lead to some confusion over the relationship between s 5L (which applies to dangerous recreational activities) and s 5M (which applies to recreational activities generally), with some speakers referring to

the statutory language used in all the jurisdictions in a different way so that the 'significance' attached to the level of risk of *any* physical harm. However, this could lead to activities with significant levels of minor injury to participants being classified as dangerous, a result that might anger those who promote those sports as 'safe'. Thus in *Falvo v Australian Oztag Sports Association*[8], Ipp JA held that a 'dangerous recreational activity' could not mean an activity that involved everyday risks attendant on games such as Oztag (a form of touch rugby) which involved a degree of athleticism with no tackling and no risk of being struck by a hard ball. However, assuming that the Court of Appeal's interpretation reflects the legislative intent, the results seem somewhat perverse. Imagine a sport whose participants suffer a relatively high rate of minor injury – sprained ankles and broken fingers. Because these are relatively minor physical harms, they may not occur with sufficient frequency to be deemed to constitute a significant risk of physical harm. Paradoxically, then, the participant who suffers the relatively minor injury is not caught by the section and can sue the organiser/occupier whilst the participant in a sport with a numerically smaller number of more serious injuries is denied the possibility of an action in negligence.[9] If the latter is denied an action it may seem incongruous to allow the former a claim.

Assuming that the balancing exercise is required, it remains necessary to evaluate whether the end result amounts to a 'significant' risk. Both Ipp and Tobias JA thought that 'significant' could not be given a precise meaning; Ipp JA thought it meant more than trivial and less than one that was

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dangerous recreational activities but only in the latter context (e.g. New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 October 2002, 6244 (Mr Ashton); New South Wales, *Parliamentary Debates*, Legislative Council, 19 November 2002, 6924 (Ian Cohen, Peter Breen).

8 [2006] NSWCA 17.

9 Basten JA seemed to recognise this point by noting (at [131]) that there was no reason why the legislature would exclude liability for serious harm but not for insignificant physical harm but by determining 'risk of physical injury' through balancing the probability and gravity of harm his approach may in fact lead to that result. Of course, there may be also be other provisions of the legislation that prevent the bringing of small claims (eg *Civil Liability Act 2002* (NSW) s 16 excluding claims for non-pecuniary loss in respect of minor injuries).

likely to occur, and Tobias JA agreed in general terms with this approach.[10] Both agreed that any attempt to define the term with greater precision was to be avoided. Apart from expressing caution over drawing an analogy with 'material risk' as explained by the High Court in *Rogers v Whittaker*[11], Basten JA also decried any attempt to provide details as to what 'significant' might mean in this context. Given the fluidity of the term, it is not surprising that Ipp JA accepted that a variety of sources could be used to determine if significance was established; these included expert evidence as to the degree or incidence of risk, and the application of logic, common sense or experience to the particular facts of the case. On these facts, the decisive factors for Ipp JA in holding that the risk was significant were the lack of experience of the participants and the time when the activity occurred (after a long drive, a meal, and some alcohol). Tobias JA agreed, describing the activity in which the plaintiff was engaged as a 'recipe for disaster' in which the risk of a firearm being discharged unintentionally was clearly significant.[12] Although Basten JA was in dissent on this point, the difference is based as much on procedure as substance: Basten JA did not reject the individual circumstances of the case as being relevant to determining whether the risk was significant, but as the defendant had not conducted the case in this way, and as the court had not been directed to any evidence which would allow significance to be assessed, it was not appropriate for the court to determine the question in this way. But for the procedural history, there is no reason to think that Basten JA would have ignored the circumstances specific to the case in determining whether the risk was significant, a conclusion

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[10] Although Tobias JA referred to a significant risk as one that had a real chance of occurring, and Ipp JA rejected 'real' as an appropriate description, the approaches are similar. The rejection of 'real' as a descriptor by Ipp JA referred to its use to describe risks which were not far-fetched or fanciful, and it is clear that Tobias JA is not using 'real' in this sense as he refers to 'real' risk as being one that is closer to 'likely to occur' than 'trivial'.

[11] (1992) 175 CLR 479.

[12] *Fallas* [96].

supported by His Honour's rejection of two other possible ways of determining the question.[13]

The final requirement that had to be satisfied for the section to apply was that that the injury was caused by the materialisation of an obvious risk of the activity. All three judges accepted (as had the Ipp Panel) that in appropriate circumstances an obvious risk could be a risk that someone might be negligent.[14] But there was disagreement over whether the obvious risk that caused the injury had to be one of the risks that made the activity a dangerous recreational activity. Basten JA held that it must be; Ipp & Tobias JJA thought it did not. In most cases the result will not differ depending on which view is taken: significant risks of injury are likely to be obvious. However, Ipp JA provides some examples where the probability of the obvious risk is sufficiently low that it might not amount to a significant risk and hence is not a risk that brings the section into play.[15] There is certainly no logical imperative that the risk that determines the activity to be dangerous be the one that materialises – the section operates perfectly well using either interpretation – and in the absence of statutory language mandating the approach of Basten JA the majority view is preferable. On the facts, however, this issue did not arise and the question was simply whether the risk that materialised was obvious. Again, the court disagreed, Ipp JA holding that the risk was not obvious with Basten & Tobias JJA holding that it was. An obvious risk is defined as a risk that in the circumstances would be obvious to a reasonable person in the position of the person who suffers harm.[16] All agreed that the 'circumstances' were to be considered with a high degree of particularity; thus obviousness could only be determined by looking at the particular circumstances of the discharge, including the assurances given to the plaintiff by the defendant that his conduct was safe. Even at this level of particularity, however, Basten & Tobias JJA thought the risk was still obvious.

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[13] *Fallas* [145]–[148]. The first was that, because the seriousness of harm from an accidental shooting might be catastrophic, *any* risk of harm was significant. The second approach was to consider empirical statistical evidence as to the frequency of accidents relating to the activity in question

[14] Ipp Report, para 4.16.

[15] *Fallas* [41]–[42].

[16] *Civil Liability Act 2002* (NSW) s 5F.

As Basten JA noted, the statutory definition provides that a risk may be obvious even if it has a low probability of occurring, so that in many cases where a gun is pointed at someone, even if there are assurances that the gun is unloaded, there is still *a* risk that it might still be loaded and might discharge. Perhaps the result might have been different if the parties knew each other better so that the assurances might have been given more weight and the reasonable person's perception of the risk would be so low as to be discounted as trivial. Clearly, however, that was not this case; the conduct of the plaintiff was clear evidence that he did not trust the defendant's assurances. A different view of the facts was taken by Ipp JA. Although he accepted that an obvious risk might be one that was created negligently, he characterised the conduct of the defendant as 'grossly' negligent, and the risk of 'gross' negligence was not one that was obvious to the plaintiff. This approach has two difficulties. First, the term 'gross negligence' is not one familiar to modern common lawyers and its meaning will need to be fleshed out before it can provide any real guidance. Secondly, its use may direct courts to the wrong question. Gross negligence may not be obvious either because it is unforeseeable or improbable, but the issue remains one of foreseeability and probability, not the character of the negligence.[17]

Only at the end of the judgments can one fully appreciate Ipp JA's understatement that the provisions in question concealed 'difficult questions of construction' and 'complexities' in their interpretation.[18] Of course, the tort reform legislation is still new and it was to be expected that courts would spend some time ironing out the ambiguities of the statutory provisions. As is evident from *Fallas*, however, we are only at the beginning of that process. Ironically, one of the facts justifying the decision to engage in tort reform – and provided to the Ipp Panel as an irrebuttable presumption which should guide proposals for reform – was that the law of negligence had become unpredictable and uncertain in its application. The mad scramble, at least in some States, to enact reform legislation based on the non-statutory language of the Ipp Report has hardly improved

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17 This seems to be the approach advocated by Tobias JA: *Fallas* [108].

18 *Fallas* [10].

this situation. Principles-based reform of the law of negligence may have some way to go.

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