ALSA CONFERENCE TELO ISLANDS 2012

"SURF RULES!" and the LAW

1. The genesis of this paper was a conversation at last year's conference in which I suggested ALSA should provide a definitive list of the Rules of Surfing on its website. *"Great Idea"* said Strain, *"And you're just the man to do it!"*

2. Hence the following attempt at both defining the rules, etiquette or conventions of surfing plus some observations on the consequences of a breach of such rules. However, the observations are those of a planning and environmental lawyer with a curiosity about the subject rather than any particular professional expertise and accordingly I would invite comment on the same with a view to presenting a more definitive analysis for the purposes of the website's publication. I would also welcome comments, additions or corrections to the following rules, again for the same purpose.

3. In Australia it is standard practice for prospective car drivers to undertake a course of study of the road rules and be tested as to their competence and knowledge of both driving and those rules. Should a driver subsequently breach the rules leading to damage or injury, he or she will, subject to statutory interventions, be liable to compensate the injured party by reason of the breach of duty the driver owes to fellow road users. Does the same apply to surfing's *"rules"*?

4. Most beginner surfers will be made aware of what is loosely defined as the *"Surfing Etiquette"* or *"Surfing Rules"* by the person instructing the beginner, whether it be at a surf school, a parent, mate or a long suffering and very patient experienced surfer. Even if the beginner is not appraised of such rules at the outset, he or she will be very quickly told if they are breached by fellow surfers. It is therefore a valid question to ask, if a surfer breaches the *"Surf Rules",* which breach leads to injury or damage, why shouldn't the offending surfer like a driver, be equally liable to compensate the injured party for a breach of duty of care. I suggest that it is certainly foreseeable that a loose surfboard could and does render injury should it happen to collide with an unsuspecting surfer. I also suggest that, unlike contact sports such

as football, cricket or boxing, surfers do not accept or expect to be hit by other surfers' boards in what should be a non-contact sport.

5. The consequence of a collision in the surf is something that most surfers are aware can happen and in most cases the effects, fortunately, are dings to boards, fin cuts or bruising. But what would happen if a serious head injury occurred, an eye was lost or someone was rendered quadriplegic as a result of a drop in, an escaping board or a kick-off where a board becomes a projectile rather than a piece of flotsam? Does the defence of *"volenti non injuria"* – the voluntary assumption of risk, apply in the above circumstances?

The Rules of Surfing -

6. In preparing this paper I have undertaken another form of surfing in seeking to ascertain a set of rules that could be said to apply in most wave conditions. The internet contains a variety of sites providing a list of rules for the sport, often equated with *"Surfing Etiquette"*. Various beaches around the world have signs along the foreshore supplied by surf rider foundations, surf shops or in some cases, councils[1], for instance Manly Beach has erected a sign in the shape of a surfboard contains *"The Surfers' Code".* However, apart from being able to police *"no board riding"* between the red and yellow flags, such rules are not enforceable at law, although that is not to say an enforcer may not administer a penalty to someone deliberately or blatantly in breach.

7. As part of my internet surfing I came across some fascinating papers delivered by a number of very learned members of the international surfing community. In December 2000 the "Law of Surf Forum" was convened by Associate Professor Brian Fitzgerald, the Head of School of Law and Justice at the Southern Cross University in Byron Bay. The Forum consisted of surfing experienced presenters such as Justice Greg James of the Supreme Court of New South Wales, Professor Stanley Yeo of Southern Cross University, Professor William Fisher of

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1 *witchsrocksurfcampwebsite.com/blog/surfing-etiquette…*

Harvard University Law School, Nat Young, Rusty Miller and a number of others. The paper includes a summing up by Justice Greg James:

> "The summing up is quiet short. You have got a law professor, you have got a Judge, you have got a legislator, you have got a wave surfer with his experience, you have got an environmentalist, you have got the analogy of the internet coming from a surfer/lawyer, you have got a whole group of concerned people. You have got books being published, the interest of television channels, the interest of newspapers, and the development of the expression of a code behaviour.
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> All of that is because of the awareness that legislation should be the last resort. That the legal sanction is one people would rather avoid. We would all rather see the heavy-handed legal regulation of the states should be the last resort. But there are times when there are individuals who insist that they will not seek to gain respect by giving respect, not seek to share the surf. There are individuals who the law can deal with by Apprehended Violence Orders, if necessary by court enforcement of community based banning sanctions through such remedies as injunctions for nuisance or banning by way of Apprehended Violence Orders from particular surfing locations.
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> It will be a great pity if anyone had to be the subject of such orders. It would be a great pity if, under the Local Government Act, beach inspectors, special constables or police, policing the legislation should have to intervene. They will not if surfers are prepared to develop a culture for ourselves and ensure that the best standard of behaviour by all of us is to be encouraged and evidence by that culture. There is a basic rule – a very basic rule – and, at bottom, it can avoid the application of any further restrictions to surfing.
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> That politician's child that was referred to should not ever be injured, and will not be injured, if people yield the right of way, take up the courtesy Terry has referred to, follow the same code of courtesy as has been suggested, basically by everyone speaking tonight and remember that the last rule of admiralty, the last rule of the road, the basic rule is in the event there is likely to be an accident, an injury and you can avoid it, it is up to you to do that."

8. This Forum was followed up by the second Law of the Surf Forum 2001 reported in Volume 6 2002, Southern Cross University Review, 318. A similar array of luminaries attended included Associate Professor Stephen Kuhn of the University of Wollongong who delivered a paper "The Existence and Content of Surfing Norms" (above reference at page 330). A fascinating paper entitled "The Tragicomedy of the Surfers' Commons" by Daniel Nazer, a law clerk to the Chief Judge of the United States District Court for District of Vermont was published in Volume 9 No 2 of the Deacon Law Review. This 58 page analysis identifies the complicated set of norms or rules that govern behaviour in the surf and priority over waves and in particular deals with localism with many interesting observations to which I would direct an interested reader.

Justice Margaret McMurdo, President of the Queensland Court of Appeal delivered two papers dealing with the Civil Liability Act of Queensland and beach safety in April 2006 and November 2007 respectively which are available through the Supreme Court of Queensland Library.

9. From the above and a number of other publications and internet chatter it is obvious that the surfing community does not wish to see the "unwritten rules" converted into legislation, a regulation or some other local law that could lead to enforcement. That is not to say, however, that there is not a fairly clearly recognised set of rules that exist and which appear, by and large, to regulate the primary rule of "one person one wave".

10. I set out in the following paragraphs a list of rules that appear to be commonly accepted and will do so in an order that starts from the beach and progresses out the back. In doing so, I acknowledge that the cardinal rules are:-

(a) Do not drop in;

(b) The Right of Way;

(c) Paddling Rules.

11. As indicated above, the following attempts to present the rules in a logical sequence from the start to the finish of a good surf.

Check your Equipment –

Always check the state of your equipment. Try to get all the dings (damage) fixed on your surfboard that have fibreglass protruding to avoid damage to yourself and others. Check the back edge of your fins, if they are sharp, lightly sand the edge off them with a bit of wet and dry sandpaper to dull the sharpness. Consider placing a nose guard on the end of your board to reduce the risk of stick injuries. Check your leg rope to ensure it is in good condition. Whilst the leg rope is not a safety harness, it prevents the board from becoming an unguided missile should you separate from it.

Learner Surfers –

Do not venture out the back to the take-off zone, unless you are capable of controlled take-offs on a main peak situation. You should not be out in the line-up where more experienced surfers are as it is not only dangerous to yourself, but also to the more experienced surfer, especially if you are unable to control your board or manoeuvres. Utilise the whitewash whilst learning to surf.

To practice take-offs out the back, look for a section of beach where you will not interfere with or get in the way of other more experienced surfers – and only do so if you are capable of swimming back to the beach should your leg rope break.

Paddling Rules –

Do not paddle straight through the heart of the line-up where people are surfing. Paddle out in a channel where the waves aren't breaking or where people aren't surfing. Sometimes at spread out beach breaks this is hard, but usually there is a less crowded area to paddle through.

When paddling back out, do not paddle in front of someone riding a wave unless you are well in front of that person. You must paddle behind those who are up and riding and take the white water hit or duck dive. Sometimes you'll just end up in a bad spot and will not be able to paddle behind the surfer. It is your responsibility to speed paddle to get over the wave and out of his or her way.

(When riding, if it looks like you might collide with a paddler, avoid him or her at all costs, even if it means proning out or pulling off. Do not take unnecessary or dangerous risks.)

The paddling surfer should always yield to the surfer riding the wave.

Don't Ditch Your Board –

This is important, especially when it is crowded. Always try to maintain control and contact with your board. Surfboards can be large and heavy and are always hard. If you let your board go flying around, it is going to eventually clock someone in the head. This means if you are paddling out and a wall of white water is coming, you don't have permission to just throw your board away and dive under. If you throw your board and there is someone paddling out behind you, there is going to be carnage.

Don't Snake –

Don't paddle up inside someone as they are trying to catch the wave. This is known as *"snaking"*, when a surfer paddles around another surfer in order to position him or herself to get the right of way for a wave, effectively making a big *"S"* around a fellow surfer. Whilst not immediately hazardous, it is incredibly annoying and can, in some circumstances, lead to a black eye. You can't cut the line-up, rather the newly arrived surfer should observe the following rule.

Right of Way –

The surfer closest to the peak of the wave has the right of way. This means if you are paddling for a right, and a surfer on your left is also paddling for it, you must yield to him or her. There are a couple of variations to this rule. If someone is up riding a wave, don't attempt a late take-off between the curl/white water and the surfer. If the surfer who is riding the wave wants to make a cut back, he or she could run right into the offender.

Just because the white water catches up to a surfer riding a wave, it does not give permission to take-off down the line. Many talented surfers can outrun the section and get back to the face of the wave.

A-Frames or Split Peaks entitle surfers on the either side of the peak to have right of way on their respective sides. It is not generally accepted to take off behind the peak if there is somebody on the other side. These surfers should split the peak and go opposite ways.

If a surfer riding a wave gets closed out with an impossible section or wipes out, the next surfer down the line can take off.

If a wave is breaking at two ends with a flat section in between and two surfers are taking off at each end, both have right of way but could obviously meet in the middle and hence it is advisable to kick out early to avoid a collision.

Wait Your Turn –

If someone has been waiting longer than you, he or she has first option for the next wave. At a point break, the surfer waiting longest usually paddles closest to the first possible take-off spot, which is called *"the inside"* of the wave. On a beach break, he or she waits a turn at *"the peak"*. So usually, the surfer paddling closest to the inside or the peak has right of way. Once the wave is caught it is that surfer's alone, but, if the surfer paddles and misses it, he or she should not expect to be given the next wave as the surfer has had a chance and has lost priority. That surfer should then wait out at least a few waves as a return courtesy to the other surfers who let him or her have their turn.

Always Look Inside –

Before you commit yourself to a wave **ALWAYS** look inside (towards the apex of the wave) to see if someone is already on or about to take off on the wave. If you do not, you could be putting yourself and another rider in serious danger because you may cause a collision and would be dropping in.

You should also look down the line to see if someone else is already on the wave who may have been further out or whether someone is dropping in. This is self-preservation and helps prevent injury or damage.

Don't Drop In –

This is probably the most important part of surfing etiquette. Dropping in means that someone with the right of way is either about to take off on a wave or is already riding a wave and the offender takes off on the same wave in front of the surfer with priority. This blocks that person's ride down the line and is extremely annoying, not to mention potentially hazardous. Repeated dropping in often leads to altercations. Remember, if you do drop in unintentionally then make sure you apologise for your error. Generally, an unintentional drop in will be forgiven, however, if the above rules are followed it should not occur.

Give a Yell –

If it looks like someone is going to drop in on you, let them know you are on the inside or have right of way by calling out and telling them you are taking off or already on the wave. Sometimes surfers drop in because they think you will not make the take-off, however, a friendly reminder of a shout like *"Mine"* or *"Going Right"* or *"Going Left"* helps clarify the situation.

Don't Be a Wave Hog –

Just because you can catch all the waves doesn't mean you should. This generally applies to long-boarders, kayakers, skis or stand-up paddlers. Since it is easier to catch waves on these watercraft, it becomes tempting to catch them all leaving nothing for short-boarders on the inside. Give a wave, get a wave.

Keep Control of your Equipment –

Never attempt a move, manoeuvre, turn or *"aerial"* that will cause you to land or smash into someone else and also keep an eye on surfers paddling out or surfers who have *"wiped out"* on the previous wave.

The Consequences of a Breach of the Rules –

12. The above rules have been established by convention with the aim of providing a safe environment in which to enjoy the end product of a wave's long journey across the oceans. They are also designed to provide for the equitable distribution of the pleasures and bounty of such waves to the worshippers of Huey – the Australian fictional God of Wind and Waves[2].

13. I suggest that the above rules are generally well known by most surfers and are, by and large, observed. Ignorant beginners are often promptly told of any transgressions. A breach of the rules, should it be unintentional, is usually accepted by most surfers with a resigned forbearance, although a repeated breach will earn the offender the general opprobrium of the group and in some instances physically admonishment.

14. But what are the legal consequences of a breach of the rules leading to damage or injury?

15. Let me pose three scenarios:-

(a) surfer A takes off at the peak, catches the wave and is looking back to the break to consider a cut back. Surfer B paddles into the wave and drops in and on surfer A causing facial injury to surfer A;

(b) stand up paddle boarder C is paddling out through the swell without a leg rope and gets knocked off with his board being caught by the wave and pushed back towards the beach crashing into surfer D's board causing deep fin cuts;

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[2] Huey is alleged to have been one of Australia's first metrologists in the Riverina region with a very accurate prediction record of rain and the term *"Send it down Huey"* is still used in reference to a rain storm in Australia.

(c) surfer E whilst paddling out is confronted with a large breaking wave and abandons his board diving under the white water causing the board to smash into following surfer F's neck fracturing his vertebrae.

16. Hayne J conveniently summarised the task of a Court in analysing such scenarios[3]:-

> *"137 Although conventionally described as a finding of fact, to make a finding that there has, or has not, been a failure to meet a standard of reasonable care requires the Tribunal (be it the judge or a jury to translate the relevant legal principle, that the defendant is obliged to take such care as the reasonable and prudent person would take in the circumstances) into what Fleming described[4] as "a concrete standard applicable to the particular case", and as a process which "involves not a determination of fact, but a formulation of a valued judgment or norm".*
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> *In undertaking that task the Tribunal of fact must first consider whether the reasonable person would have foreseen that his or her conduct involved a risk of injury to the plaintiff to a class of persons including the plaintiff. The risk is foreseeable if not far-fetched or fanciful. The Tribunal of fact must then decide what the reasonable person would do in response to that risk[5]. This latter decision requires attention to various considerations, very important among these being the magnitude of the risk of injury, the probability of its occurrence, the expense, difficulty and inconvenience of alleviating action, and any other conflicting responsibilities the defendant may have[6]. Some of these considerations (and there may be others presented by the facts of the particular case[7]) pull in different directions. Taking them all into account requires the striking of a balance.*
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> *139 Because the decision that there has, or has not, been a want of reasonable care requires this balancing exercise, it is a decision which has at least some features like the exercise of a discretion. Without any failure to apply proper principles different minds may attribute different significance to particular elements in the balancing process; they may differ about the ultimate result that is reached."*

17. I suggest in the above scenarios that a reasonable person would foresee the offending conduct involved a risk of injury to a fellow surfer. Such a risk is not farfetched or fanciful and that a reasonable person would avoid taking the offending action. The magnitude of the risk of injury varies from one circumstance to another and could be severe, the probability of its occurrence is plausible, the expense of avoiding the risk negligible as is the difficulty and

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3 *Woods v Multi-Sport Holdings Pty. Ltd.* (2002) 208 CLR 460 at 502.
4 Fleming, The Law of Torts, Ninth ed. (1998), p.145.
5 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47, per Mason J.
6 Ibid. at 47 – 48.
7 *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 455 [52].

inconvenience of alleviating action. There are unlikely to be any conflicting responsibilities of the offender.

18. I also suggest that each scenario is an example of negligence, which, in the absence of any exculpatory matter, would render the offender potentially liable for the consequences should they be pursued in a court. Assuming the injured party is able to identify the offender and successfully prove the factual basis of the claim, the real risk of such litigation may largely hinge on the asset backing of the Defendant. It is worth bearing in mind that most householder insurance policies provide personal indemnity cover against which any successful judgment could be executed.

19. However, behind all good litigation lurk the rocks of a defence or statutory exclusion. One such defence would no doubt involve whether the Plaintiff consented to the risk of the tort being committed.

20. The Latin maxim, *"volenti non fit injuria"* is commonly used to embrace the concept of consent. Assumption of risk has been summarised as[8]:-

> *"If the Defendant's desire to succeed on the ground that the maxim "volenti non fit injuria" is applicable, they must obtain a finding of fact that the Plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it."*

21. On the principle that plagiarism is the best form of flattery, the following discussion relies upon the much more comprehensive analysis of *"sporting injuries"* contained in the CCH Australian Torts Reporter, sections 12-200 – 12-305 at pages 18,451 and following.

22. The above defence is commonly seen in sporting cases or where a person gets into a motor vehicle knowing the driver to be under the influence of alcohol. In sporting cases the application of the law of negligence was confirmed by Kitto J[9] in *Rootes v Shelton*:

> *"I cannot think that there is anything new or mysterious about the application of the law of negligence to a sport or a game. Their kind is older than the common law itself."*

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8 *Leting v Ottawa Electrical Railway Co.* [1926] AC 725 at 731 (PC), citing *Osborne v London & North Western Railway Co.* (1888) 21 QBD 220.

9 *Rootes v Shelton* (1967) 116 CLR 383 at 387.

Rootes's case involved a water skier suing a boat driver for failing to appraise him by an appropriate signal of a stationary boat and in driving the towing boat on a course that would take the Plaintiff close to the boat into which he collided. The Defendant argued the risk of a water skier colliding with an obstacle in the water was a recognised and accepted risk of the sport and hence owed no duty of care. The trial Judge rejected the submission holding that although there could be no duty owed in relation to risks inherent in the activity, the relevant risk of injury was the driver's failure to warn of the obstacle and this had not been assumed by the Plaintiff. The High Court upheld the trial Judge's decision, reversing the Court of Appeal's decision that no duty of care was owed.

23. The Australian Torts Reporter provides the following discussion in Section 12-230 **Voluntary assumption of risk and consent**:-

> Consent may take two forms and it is not unusual to see the terms used interchangeably. It can take the form of a plaintiff consenting to an invasion of their interests which would otherwise amount to the tort of trespass and this is conveniently called "consent". Or it can take the form of a willingness on the part of a plaintiff to run the risk of injury from a particular source of danger and this is called voluntary assumption of risk or *volenti non fit injuria*. In *Bain v Altoft* (1967) QdR 32, the defence of voluntary assumption was held to apply where the plaintiff had consented to fight the defendant. In *McNamara v Duncan* (1971) 26 ALR 584 at p.588, Fox J held that in cases of trespass voluntary assumption has a different application to that in negligence. In negligence it refers to the risk of injury, whereas in trespass it refers to consent to the trespass.
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> As noted in the paragraph above, voluntary assumption of risk is one of the major common law defences to negligence in sporting activities. This is because there would appear to be risks of personal injury inherent in most sporting activities, risks which a participant would typically have been made aware of beforehand and consented to. In *Agar v Hyde* (2000) Aust Torts Reports 81-569 Gleeson CJ stated at [15] that:-
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> > *"People who pursue recreational activities regarded as sports often do so in hazardous circumstances; the element of danger may add to the enjoyment of the activity. Accepting risk, sometimes to a high degree, is part of many sports. A great deal of public and private effort, and funding, is devoted to providing facilities for people to engage in individual or team sport. This reflects a view, not merely of the importance of individual autonomy, but also of the public benefit of sport. Sporting activities of a kind that sometimes result in physical injury are not only permitted; they are encouraged."*
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> In *Rootes v Shelton* (1967) 116 CLR 383, Barwick CJ stated at [385] that:-
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> > *"By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not*

> *eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connexion, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist."*

In *Vairy v Wyong Shire Council* (2005) Aust Torts Reports 81-810, Gleeson CJ also observed the public policy implications of the varying degrees of inherent risks in sport and recreational activities (at[5]):-

> *"Many forms of outdoor recreation involve a risk of physical injury. In some cases, while the risk of injury may be small, the consequences may be severe. Swimming is a popular recreational activity along the Australian coast. It involves certain risks, and sometimes results in injury, or even death. The level of risk varies according to the locality, the conditions at any given time, and the capabilities of the swimmers. Short of prohibiting swimming altogether, public authorities cannot eliminate risk. A general prohibition in a given locality may be a gross and inappropriate interference with the public's right to enjoy healthy recreation."*

Thus, a legitimate bump and risk of consequent injury is a risk inherent in football, while being hit *"behind the play"* is not. In the case of the former, a defendant may successfully plead voluntary assumption of the risk while in the case of the latter the offending player may be faced with a civil action of trespass to the person or negligence, as well as facing a possible criminal action of assault. The plaintiff is said to consent to the ordinary incidents of a game of the kind in which she/he was taking part but not to actions that fall outside the rules. Thus, a breach of duty on the part of an umpire or referee, whose duty it is to apply the rules and ensure that they are observed, will not be able to plead the defence of voluntary assumption of risk if a player is injured: *Smoldon v Whitworth and Nolan* (1996), *The Times*, 18 December.

For the defence of voluntary assumption of risk to succeed, it must be shown that the plaintiff consented to the eventuation of risk of injury which did, in fact, occur. Nicholson J in *Scanlon v American Cigarette Company (Overseas) Pty. Ltd. (No 3)* (1987) VR 289 said there are three elements:

- precise knowledge of the risk by the plaintiff
- understanding and appreciation of the risk by the plaintiff, and
- voluntary participation, i.e. there must be no coercion by the defendant …

The rules of the sport provide the starting point for consideration of the defence of voluntary assumption of risk, although these are not conclusive. The question to consider is: what did the plaintiff assume the risks of playing or participating in the sport were? If the injury sustained by the plaintiff was not the result of any risk which was inherent in the sport which the plaintiff could be taken to have accepted (*Harrison v Vincent* (1982) RTR 8 …) or outside the rules of the game, even though such acts may commonly occur, then unless the occurrence is ordinarily and reasonably to be contemplated, consent cannot be said to have been given by the plaintiff. ….(a number of cases cited).

24. The Australian Torts Reporter discusses the obligations of sport participants and officials at page 18,521 and following, and, in particular, **Player against player** in Section 12-250. The following extracts appear relevant to the purposes of my discussion.

> 12-250 Player against player
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> Player and participant (such as jockeys) liability is only just developing in sport. This has been due in part to the attitude of players, participants and officials believing that what happens on the field stays on the field. However, other factors which could have contributed to this attitude could have included the question of whether a player should be held responsible for what they did in the *"heat of the movement"* when trying to win and the extent to which players and participants have consented to accept a degree of injury in the sport in which they are participating.
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> In *Rootes v Shelton* the High Court confirmed that players owe a duty of care to each other, albeit a reduced standard of care. In determining duty, while the courts will have recourse to the rules of the particular sport, particularly where they might relate to safety and the playing culture of the game, whether or not a player has been negligent will depend upon whether the defendant has failed to exercise reasonable care for their opponent's safety and the risks inherent in the game: ….
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> (Thereafter a number of cases are cited. They include the following as ones perhaps more relevant for my purposes).
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> - *Pollard v Trude* (2008) Aust Torts Reports 81-989 [2008] QCA 421 – the appellant was unable to recover damages when he was struck by a golf ball. The court held that the magnitude of the risk and the likelihood of its occurrence together with the common expectation of both the appellant and the respondent was that the latter, an experienced and competent golfer, would play the shot. The response of a reasonable person in the circumstances would have been to take the shot.
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> - *Ollier v Magnetic Island Country Club Inc & Anor* (2004) Aust Torts Reports 81-743; [2003] QCA 137 – an occasional golfer who had a knowledge of the rules of golf and understood that *"No player should play until the players in front are out of range"*, drove off from the tee while the plaintiff was within range of being struck and was thus at risk of being injured and hit him. Leave to appeal to the High Court was refused, the court holding that the case turned on its own particular facts and did not raise a principle of law requiring the High Court's attention.
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> - *Lewis v Buckpool Golf Club* 1993 SLT (Sh Ct) 43 – where a wayward shot by a high handicap golfer struck a player on an adjacent green, the court felt he could easily have waited to clear the green before teeing off.
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> - *McVety v Mahoney* (1980) 25 AR 173 – a golfer drove off from the tee before the party in front of him had cleared the green, striking and injuring a player.
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> What is the standard of care against which a player is to be measured? In *Rootes v Shelton* two possible approaches were identified. Barwick CJ takes a more generalised duty of care and modifies it on the basis that the participants in the sport impliedly consent to taking risks which would otherwise be a breach of the duty of care. Alternatively, Kitto J applies the ordinary principles of negligence and uses a generalised duty of care where all the relevant circumstances are taken into account.

> This is more akin to the *"neighbour principle"* propounded by Lord Atkin in *Donoghue v Stevenson* (1932) AC 562 where a player is under a duty to take all reasonable care, taking into account all the circumstances in which she/he is placed.
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> *Rootes v Shelton* was accepted as a correct statement of the law by the English Court of Appeal in *Condon v Basi* (1985) 1 WLR 866. In that case, the plaintiff and defendant were amateur members of opposing soccer teams. During the course of the match, the defendant executed a sliding tackle on the plaintiff and broke the plaintiff's leg. The evidence established that the tackle had been dangerous and reckless, though not malicious. The court preferred the approach of Kitto J, where a generalised duty of care is used and all the circumstances are taken into account. In *Condon's* case, the defendant had shown a reckless disregard for the plaintiff's safety and had failed to take reasonable care to avoid injuring him.
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> This test appears straightforward but a difficulty with it lies in the fact that, in sport, most of the injuries suffered by participants are a result of the actions of an opponent in the heat of the moment. It then becomes difficult to draw a distinction between playing the game and careless play which can be said to amount to negligence. The court has tried to address this problem by introducing a variable standard of care, which is used in other areas of the law, for example, the medical profession. Lord Donaldson suggested in *Condon v Basi* that different standards of care can apply to different levels of sport, giving an example that there will be a higher degree of care required of a player in a First Division football match than of a player in a local league football match.
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> It is clear that a player or participant in a sporting activity owes a duty to take all reasonable care to other players or participants in the context of the particular sport in which they are participating. In Australia this means that participants will be judged by the standard of the ordinary reasonable player or participant. See, for example, Priestley JA in *Johnston v Frazer* (1990) Aust Torts Report 81-056 (the plaintiff, an apprentice jockey, was injured when a fellow jockey was riding his horse on the outside of the field cut in dangerously close to the horses inside him, causing the plaintiff to fall. The New South Wales Court of Appeal applied the test of the reasonable man riding as a licensed jockey in a horse race) where he preferred the approach of Kitto J and approved the decision in *Condon v Basi* and *Pelling v Kliese* (1998) (unreported, Supreme Court of Queensland, 5 June) where Chesterman J held that the defendant failed to take reasonable care during a race, causing a fall and injuring the plaintiff. In *Pelling's* case, Chesterman J noted that the stewards' decision not to charge *Pelling* over the fall appeared to be motivated by concerns with the rules of racing and protecting the interests of those who invested money in the race, whereas the court weighed up whether there was a breach of duty of care.
>
> Ultimately, each case is going to turn on its own particular facts. If the participants are professionals with great skills, then this is one of the circumstances that will need to be considered when determining the standard of care. Consideration will also need to be given to the level of risk involved, the degree of probability of the risk occurring, the purpose of the activity and the cost of taking alleviating action, the practicability of precautions, the social utility of the sport, and the other conflicting responsibilities which might face a defendant.

25. As can be seen from the above discussion many of the examples involve organised sport between competing teams or players. Surfing, however, is an individualistic sport where

competition is the exception rather than the rule (I concede there is competition in going for the wave, but this is the reason for the rules earlier discussed). I suggest that the above cases involving golfers who should have refrained from hitting off in circumstances where there were still players in front of them is analogous to a surfer dropping in or someone abandoning a surfboard. The action is clearly avoidable, offends the rules and common sense.

26. I also suggest that surfers do not consent by their actions of going into the water to such risks occurring. Indeed it is a very common experience that tempers become very frayed when people breach the above rules and that there is a general intolerance of such behaviour within a group of surfers. As the authors say in the above text, each case is going to turn on its own particular facts and each will be dependent upon the ability to prove identity and having the Court accept the Plaintiff's version of what happened.

27. The observations of Kirby J (admittedly dissenting yet again) in the case where a player was struck in the eye by a ball when batting in a game of indoor cricket are interesting[10]:-

> *"**Voluntary Assumption of Risk** by its notice of contention, the respondent urged that the risk of serious eye injury was included in the "inherent" risks accepted, or appreciated by the appellant, that it was obvious that he appreciated the risk of being hit by the ball and hence that this was not something from which a reasonable person in the position of the respondent was obliged to protect the appellant.*
>
> *This argument should likewise be rejected. The only risks that might be described as "inherent" were those against which the respondent could not protect the appellant by the exercise of reasonable care and diligence[11]. Any other risks are not "inherent". They were unnecessary and unreasonable. The law would not impute to the appellant the acceptance of such risks. To satisfy the test of voluntary assumption of a risk, it must be shown that the claimant fully comprehended the extent of the risk and chose to accept or ignore it[12] …".*

28. Contrast the above observations with those of Hayne J at 503:-

> *"The second point I wish to deal with concerns the "obviousness" of a risk.*

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10 *Woods v Multi-Sport Holdings Pty. Ltd.* (2002) 208 CLR 460 at 499.

11 *Insurance Commissioner v Joyce* (1948) 77 CLR 39 at 45-46; *Roggenkamp v Bennett* (1950) 80 CLR 292 at 298.

12 Balkin & Davis, Law of Torts, Second Ed. (1996), p.349.

The respondent sought to contend, in this Court, that the appellant's claim should fail because he had voluntary assumed the risk of injury. If it had been necessary to consider that question, it may have been relevant to enquire whether the risk that came to past was a risk that was obvious to all, and that, absent some evidence to the contrary, it should accordingly to be found to have been known to the appellant. For the moment, however, it is important to notice another aspect of the obviousness of the risk that is not related to the defence of voluntary assumption of risk. The obviousness of the risk that a player participating in an indoor cricket match may be hit by the ball (whether on the head or elsewhere) bore upon whether the respondent had acted unreasonably in not warning the appellant of this danger or in not providing protective helmets.

The trial Judge found that the risk of being hit (by the ball, by a bat, or by another player), was an obvious risk of the sport. When one of the recognised techniques of the sport is to bowl the ball at the player who is batting at such a speed that it cannot be hit, the risk of being hit by the ball when batting is indeed obvious. It is no less obvious that the risk of injury would vary according to the part of the body that is hit, according to the force of the blow, and according to what it was that struck the blow – the ball, the bat or another player. And in a fast moving and energetic game like indoor cricket, a collision with any of the equipment used in the game or with another player may be very serious indeed. A blow to the head or to the region of the eye could well cause very serious injury – more serious than a similar blow to some other part of the body. That a player could suffer serious injury, even permanent and disabling injury, by playing the sport was evident to all participants in it. Reasonable care did not require the respondent to warn participants of that. Nor was there any reason to single out one form of injury and warn of that. There is, therefore, no reason to disagree with the trial Judge's conclusion that reasonable care did not require the respondent to warn of the specific risk of eye injury."

29. The analogy between a car driver and a surfer is perhaps apposite as I first postulated in the introduction. A driver knows that if the rules of the road are complied with, it is unlikely that he will be injured unless he breaches them himself or runs off the road. The driver also recognises that on occasion accidents happen, often caused by people breaching the rules and that injury can occur. The Courts have not found that such drivers have consented to such injuries nor that they regard it as being obvious or inherent risk of driving. I recognise there may well be significant policy issues associated with the above analogy and that statutory intervention relating to motor vehicle accidents and compulsory insurance and compensation have intervened since the good old days, however, the propositions behind the analogy are worthy of consideration.

Statutory Defences –

30. Legislation has now been enacted to reinforce the defence of voluntary assumption of risk[13]. I shall limit my discussion to the Victorian and New South Wales legislation for the sake of brevity.

31. Section 54 of the Wrongs *Act* 1958 (Vic) provides:-

> *"54 Voluntary Assumption of Risk*
> *(1) If, in a proceeding on a claim for damages for negligence, a defence of voluntary assumption of risk (volenti non fit injuria) is raised and the risk of harm is an obvious risk, the person who suffered harm is presumed to have been aware of the risk, unless the person proves on the balance of probabilities that the person was not aware of the risk.*
> *(2) Sub-section (1) does not apply to –*
> *(a) a proceeding on a claim for damages relating to the provisions of or the failure to provide a professional service or health service; or*
> *(b) a proceeding on a claim for damages in respect of risks associated with work done by one person for another.*
> *(3) Without limiting s.47, the common law continues to apply, unaffected by s.s.(1), to a proceeding referred to in the s.s.(2)."*

32. Section 53 of the Act provides:-

> *"53 Meaning of obvious risk*
> *(1) For the purposes of s.54, an obvious risk to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in a position of that person.*
> *(2) Obvious risks include risks that are patent or a matter of common knowledge.*
> *(3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.*
> *(4) A risk can be an obvious risk even if the risk (or a condition or 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."*

33. Section 5G of the *Civil Liability Act* 2002 (NSW) provides:-

> *"5G Injured persons presumed to be aware of obvious risks -*
> *(1) In proceedings relating to liability for negligence, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risks.*
> *(2) For the purposes of 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."*

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13 *Wrongs Act* 1958 (Vic), *Civil Liability Act* 2002 (NSW), *Civil Liability Act* 2003 (Qld), *Civil Liability Act* 1936 (SA), *Civil Liability Act* 2002 (WA), *Civil Liability Act* 2002 (Tas), *Civil Law (Wrongs) Act* 2002 (ACT).

34. Section 5F deals with the meaning of obvious risk:-

> *"5F Meaning of obvious risk –*
> *(1) For the purposes of this division, an "obvious risk" to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.*
> *(2) Obvious risks include risks that are patent or a matter of common knowledge.*
> *(3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.*
> *(4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable."*

35. The *Civil Liability Act* also includes a division relating to *"recreational activity"* and *"dangerous recreational activity"*. Section 5K provides the following definitions:-

> *"5K Definitions*
>
> *In this Division:-*
>
> *"dangerous recreational activity" means a recreational activity that involves a significant risk of physical harm.*
> *"obvious risk" has the same meaning as it has in Division 4.*
> *"recreational activity" includes:-*
> *(a) any sport (whether or not the sport is an organised activity); and*
> *(b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and*
> *(c) any pursuit or activity engaged in a place (such as a beach, park or other public open space) where people ordinarily engage in sport or any pursuit or activity for enjoyment, recreation or leisure."*

36. Section 5L deals with obvious risks of dangerous recreational activities and provides as follows:-

> *"5L No liability for harm suffered from obvious risks of dangerous recreational activities*
> *(1) A person ("the defendant") is not liable in negligence for harm suffered by another person ("the plaintiff") as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.*
> *(2) This section applies whether or not the plaintiff was aware of the risk."*

37. Finally, Section 5M provides that no duty of care for recreational activities will be established if the risk was the subject of a risk warning to the Plaintiff. Based on my above three scenarios that particular sub-section is not relevant nor is the following sub-section 5N, "waiver of

contractual duty of care for recreational activities" unless of course the Plaintiff was seeking to claim against someone providing surf lessons or recreation services.

38. So what does all the above mean? Having regard to my three scenarios is the risk of harm for a person who goes surfing *"obvious"*?

39. In dealing with the above question, it is apparent that the Victorian legislation provides an additional sub-section[14] that excludes a risk if it is created because of the failure on the part of a person to operate *"the thing"*. What if *"the thing"* is a surfboard? After all it is the contact with the surfboard that inflicts the injury not the surfer or the wave although the surfboard is under the control of the surfer and hence under that person's operation. Does *eusdem generis* apply to this sub-section and is it directed more to machinery rather than water craft? The *"Note Up"* search on the AustLii website fails to disclose any cases that appear to deal with this question.

40. It is an interesting observation that the paucity of cases in the abovementioned *"Note Up"* for the Victorian legislation dealing with the meaning of *"obvious"* risk is in stark contrast to the equivalent section in New South Wales (i.e., Section 5F – which replicates the first four sub-sections of Section 53 of the *Wrongs Act*). It would appear that in New South Wales there are a large number of cases where the defence has been taken. As an aside, I pause to wonder whether the lack of such cases in Victoria reflects the more gentile nature of ALSA's southern brethren which in turns leads to a question of whether it is safer to surf in Victorian waters than it is in New South Wales, and whether the *"obviousness"* of the risk of surfing may be greater in New South Wales.

41. Such gratuitous observations aside, Latham J in May 2012 has perhaps most usefully summarised the New South Wales authorities[15]. In *Streller's* case, a 16 year old experienced competitive diver jumped from the branch of the tree into the Murray River on a number of occasions prior to using a rope in order to perform a backflip into the water where his head

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14 *Wrongs Act* 1953, Section 53(5).

15 *Streller v Albury City Council* [2012] NSWSC 729 (28 May, 2012).

struck the sandy bottom causing him to suffer quadriplegia. Not unsurprisingly the Defendant's counsel sought to rely upon section 5F. Latham J having referred to the definition made the following observations:-

> *"76 Thus, the question of obvious risk involves the determination of whether the plaintiff's conduct involved a risk of harm, which would have been obvious to a reasonable person in his position. The test is an objective one and must take into account the objective circumstances of the plaintiff, that is the plaintiff's age, observations, experience and knowledge of the area and the applicable conditions under consideration.*
>
> *77 In Laoulach v Ibrahim [2011] NSWCA 402, Tobias AJA (Gillies JA and Macfarlan JA agreeing), at [79] and following, referred to the discussion of obvious risk undertaken by the court in Jaber v Rockdale City Council [2008] NSWCA 98. After noting at [35] in Jaber that "whether or not a risk is "obvious" may well depend upon the extent to which the probability of its occurrence is or is not readily apparent to a reasonable person in the position of the plaintiff", Tobias AJA then referred to what was said in Wyong Shire Council v Vairy [2004] NSWCA 247 at [161], namely that:-*
>
> > *"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."*
>
> *78 Further,:-*
>
> > *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. This risk would be considered obvious if, in the leading up to 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.*
> >
> > *Vairy [162]*
>
> *79 Tobias AJA later confirmed in Laoulach at [120] that the above proposition cannot be divorced from the factual context in which it is to be applied."*

42. I suppose the question to be determined is whether in my scenarios, the risk to a plaintiff *"out for a surf"* is obvious? Whilst it is *"foreseeable"* are such incidents *"obvious"*? The answer to this question is perhaps to be determined having regard to the circumstances in which the incident occurs. If for instance, one was surfing at a beach that is notorious for people who do not observe the rules or has an excessively large number of beginners, that may be a

circumstance that justifies a risk of being obvious. (Such things would rarely happen in Victoria!)

43. This issue is obviously a very live issue and will need to be the subject of evidence as it would ultimately be a question of fact to be determined by the relevant forum in which any litigation was brought. I would prefer not to draw any conclusions as to whether any such risks are obvious as, I suspect, such an opinion is highly coloured by one's experience. It is also worth raising the question of whether this legislation applies to actions in trespass as opposed to negligence and whether a trespass to a person committed negligently is caught by its provisions. I will leave that subject to those more learned in the esoterics of Tort[16].

44. There are two papers to which I draw the reader's attention that deal with the question what constitutes "the obvious risk". The first is by the President of the Queensland Court of Appeal, McMurdo J, entitled "*Dangerous Liaisons with the Civil Liability Act 2003 (Qld)*" – 26 April 2006, delivered to the Lexis Nexis Professional Development Conference dealing with personal injury in Queensland. The second paper is by Sydney barrister, Dominic Villa, reported in the 2009 Australian & New Zealand Sports Law Journal entitled "*Liability for Personal Injury arising from the Supply of Recreational Services*". Both deal at some length with the case of *Fallas v Mourlas*.[17] Again relying on the principle that plagiarism is the best form of flattery I provide the following section from the latter paper dealing with "obvious risk".[18]

> "In *Fallas v Mourlas*[45] Mr Fallas and Mr Mourlas were members of four man party engaged in kangaroo shooting by spotlighting. Mr Mourlas was sitting in the passenger seat of the vehicle the men were using, when Mr Fallas returned to it with a loaded gun and sat in the driver's seat. Mr Fallas began cocking the gun back and forth as it was apparently jammed. Mr Mourlas asked him several times to stop and to point the gun out of the vehicle. Mr Fallas repeatedly assured him that the gun was not loaded and that it was safe. The gun accidentally discharged, injuring Mr Mourlas in the leg. All three judges agreed for the purposes of determining whether or not a risk was obvious, that nature of the risk should be identified by reference to the particular circumstances prevalent at the time of the shooting. Despite this agreement, however, they arrived at three different conclusions.
>
> On the question of whether the risk that materialised was an 'obvious risk' for the purposes of section 5L, the Court of Appeal was divided. Ipp JA considered that the issue raised by the case was whether or not the risk of Mr Mourlas being harmed by conduct as extreme as that of Mr Fallas, which he considered amounted to gross negligence[46] was obvious. His Honour answered that question in the

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16 *McNamara v* Duncan 26 ALR 584 at 587; Street on Torts, 4th Ed, p.74; Salmond on Torts, 15th Ed, p.664; Winfield on Tort, 8th Ed, p.27 and p.740.

17 *Fallas v Mourlas* (2006) 65 NSWLR 418.

18 2009 4(1) Australian & New Zealand Sports Law Journal, 55 at 65.

negative. In doing so, his Honour noted that in cases where the obvious risk is of being harmed by the conduct of another person, the obvious risk must at least be a risk of negligent conduct for section 5L to be relevant. In some cases the risk of a person being negligent may be obvious, but in the same circumstances the risk of a person being grossly negligent may not be so obvious. Mr Fallas' conduct consisted of baseless reassurances and persistent failure to take any steps to ensure that there would be no accidental discharge of the firearm, all in response to Mr Mourlas' requests that he be careful. That conduct was so extreme that the risk of being harmed by such conduct was not obvious within the meaning of section 5L.

Tobias JA held that it would have been apparent to a reasonable person in Mr Mourlas' position that the conduct of Mr Fallas in re- entering the vehicle with his handgun (which may or may not have been loaded to his knowledge) carried with it the risk of the gun being discharged causing serious harm. In the circumstances, Mr Mourlas should be taken to be aware that Mr Fallas' reassurances, that the gun was not loaded and that it was safe, were unreliable given his continued conduct in fiddling with his gun, which he had already indicated was jammed, in the confines of the vehicle.

Basten JA noted that if the risk that is said to have materialised is simply the risk of harm flowing from the accidental discharge of a gun whilst pointed at Mr Mourlas, that risk was undoubtedly obvious to Mr Mourlas and would have been obvious to any reasonable person in the circumstances. However, if the risk takes into account the assurances given by Mr Fallas that the gun was not loaded at the relevant time, then the risk may not be obvious. His Honour had regard to the fact that for statutory purposes a risk may be obvious even though the condition or circumstances that gives rise to the risk was not prominent, conspicuous or physically observable, and even though it has a low probability of occurring. Accordingly, the risk in question involved two elements: that the gun was loaded; and that it was pointed at Mr Mourlas.

His Honour held that there must have been a risk that there was a bullet in the gun prior to its discharge, even though Mr Mourlas had been assured that there was not. Similarly, there was a risk that Mr Fallas would point it at Mr Mourlas, even though that would be a careless act done in contravention of standard rules for the handling of firearms. Therefore the risk that materialised, namely the accidental discharge of a firearm whilst pointed at Mr Mourlas, was an 'obvious risk' whatever the knowledge, belief or circumstances that existed immediately prior to discharge.

These cases demonstrate that the determination of the relevant risk will to a significant degree depend upon the precise factual circumstances in each case. The utility of a catalogue of 'obvious risks' may be doubted, but it is perhaps worth noting the following:

- In *Fallas v Mourlas* Ipp JA suggested that the risk in a game of professional cricket of a batsman being struck on the arm by a ball thrown by a careless fielder after the ball was dead was arguably an 'obvious risk', as was the risk of a professional boxer being punched in the kidneys after the bell had rung for the end of a round.[47]
- In *Jaber v Rockdale City Council the NSW Court of Appeal* upheld a trial judge's finding that the risk of injury from diving into water of shallow or uncertain depth was an 'obvious risk'.[48]
- In *Greenwood v Richmond Riparian Management Landcare Inc* Hungerford DCJ held that although the risk of slipping on a grassy slope was an obvious risk, the risk of an ankle injury resulting from the presence of a hole covered in grass that the plaintiff was unable to avoid as she slid down the slope was not an obvious risk.[49]

The assessment of whether or not a risk is obvious is to be made by postulating a hypothetical reasonable person in the position of the plaintiff. It has been held in a number of cases that in making that assessment, regard is to be had to the relative age and experience of the particular plaintiff. Thus, in *Doubleday v Kelly* the determination of whether or not the risk of injury from jumping on a trampoline while wearing roller skates was an obvious risk had to take into account the facts that the plaintiff was a child of seven, with no previous experience in the use of trampolines or roller skates, who chose to get up early in the morning and play unsupervised.[50] In *Great Lakes Shire Council v Dederer* the circumstances were diving from a bridge nine metres above the water and 10 metres from a visible sand bar. The NSW Court of Appeal held that the determination of whether the risk of injury was an obvious risk had to have regard to the fact that the plaintiff was at the time of the accident a fourteen year old boy, and the reasonable person in the position of the plaintiff was a reasonable person possessed of such knowledge as the plaintiff in fact had as to the knowledge of the area and the conditions at the time.[51]

> Perhaps the extreme example of the potentially subjectivity of the inquiry was that in *Smith v Perese*. There the defendant submitted that the risk of a spearfisherman being struck by a watercraft in circumstances where he was not displaying a dive flag, was not in the vicinity of a boat and was diving in an area where watercraft might be encountered, was an obvious risk. Studdert J disagreed, noting that the plaintiff:
>
> > … was fishing in company in an area with which he was familiar in what he perceived to be good conditions; he was using a float, which … he believed to be conspicuous; he was fishing in an area commonly fished by spearfishermen; his companion was nearby with another conspicuous float; both men were in reasonable proximity to the shoreline.[52]
>
> These might all be good reasons for holding that the plaintiff was not in fact aware of the risk, but they seem to require a description of the relevant risk to a high degree of particularity. It would also seem to take a highly subjective view of the plaintiff 's position.
>
> Having regard to the approach taken in the few cases that have considered the definition of obvious risk, the proposition that the risk of injury from dangers such as Irukandji jellyfish may be an obvious risk to locals but not an obvious risk to a foreign tourist must surely be correct.[53]
>
> 45 Fallas v Mourlas (2006) 65 NSWLR 418.
> 46 The distinction between 'negligence' and 'gross negligence' was discussed by Ipp JA at [51]-[55]. Ipp JA describes 'gross negligence', rather elliptically, as being 'negligence into an extreme degree'.
> 47 Fallas v Mourlas (2006) 65 NSWLR 418 at 423-4.
> 48 Jaber v Rockdale City Council [2008] NSWCA 98 at [38]-[41].
> 49 Greenwood v Richmond Riparian Management Landcare Inc [2007] NSWDC 185 at [79].
> 50 Doubleday v Kelly [2005] NSWCA 151 at 28.
> 51 Per Handley JA at [152] and [172].
> 52 Smith v Perese [2006] NSWSC 288 at [78].
> 53 RJ Douglas, GR Mullins, SR Grant, The Annotated Civil Liability Act 2003 (Qld) (2ed), LexisNexis, 2008, at 119. "

45. McMurdo J in her paper observed having discussed *Fallas* as well as a number of other cases:

> "What can be gleaned from these cases? Whether the interpretation by the courts of s 13, s 18 and s 19 Qld CLA will materialize into an obvious risk of dangerous changes to the common law, fairness and justice remains to be seen! The few decided cases under comparable provisions in other States suggest that the changes to the general law wrought by these so-called tort law reforms may not be as extensive as initially expected. On the cases so far decided I venture to make the following observations. At least in the circumstances of *Falvo*, Oztag is not a dangerous recreational activity, although the primary judge thought it was. In the circumstances of *Mikronis*, horse riding on a trail is not a dangerous activity. In the circumstances of *Fallas*, two of three appellate judges thought that holding a searchlight at night whilst kangaroo hunting was a dangerous activity; one appellate judge and the trial judge thought it was not. In the circumstances of *Edwards*, riding a bicycle along a narrow spur was not apparently a dangerous recreational activity. It seems it is for a defendant to bring itself within the protection of s 19 Qld CLA. The cases suggest that whether an activity involves a significant degree of risk of physical harm is apparently a difficult jurisprudential concept about which distinguished legal minds may disagree. In establishing whether or not there is a significant risk, statistical evidence of the type referred to by Ipp and Basten JJA in *Fallas* and McHugh and Callinan JJ in *Woods* may be relevant. The review of the cases set out earlier does make the simple Macquarie Dictionary definition of "significant" pretty attractive! For a defendant to benefit from the statutory defence, the plaintiff must suffer harm as a result of the materialization of an obvious risk *of* a dangerous recreational activity, not some other activity."

46. The President concluded her paper with the following observations:

> "**Conclusion**
>
> The Qld CLA and the somewhat comparable Commonwealth and State statutes to which I have referred appear to bring wide-ranging changes to actions for personal injuries involving recreational activities, especially if these activities are dangerous. It is impossible to accurately predict how the various statutes will be interpreted by the courts and whether those provisions will ultimately have the effect envisaged by the Ipp Report and the legislation. I question whether *Romeo, Agar, Woods, Swain* and *Ballerini* would have been decided differently under s 18 and s 19 Qld CLA and whether the decisions in *Mikronis, Falvo, Fallas, Doubleday* and *Dederer* would have been decided differently had the Ipp Report reforms not been implemented by the relevant State legislatures. Such cases will always turn very much on their own facts.
>
> In the meantime, as we wait for principles of law to be developed, refined and applied by courts to particular factual situations, I suggest that when you are undertaking your brief moments of enjoyable or relaxing activity, be careful. If you have been working too hard on your clients' claims and defences in respect of injuries received whilst undertaking arguably dangerous recreational activities, your tiredness, your lapses of attention, your hangover and the late hours you keep may place you at a significant degree of risk of physical harm caused by the materialization of a risk which any reasonable person in your position would regard as obvious, so that a negligent provider of services for your enjoyable or relaxing activity could claim a defence under s 19 Qld CLA!"

47. The New South Wales legislation throws up the added complication of what is a *"dangerous recreational activity"*? Again, Latham J dealt with this in *Streller's* case where he observed:-

> *"93 A dangerous recreational activity is a recreational activity that involves a significant risk of physical harm (s.5K).*
>
> *94 In Fallas v Mourlas [2006] NSWCA 32 at [90] – [91] and in Jaber at [50] Tobias AJA articulated the appropriate approach with respect to the definition of dangerous recreational activity. The term "significant" qualifying the extent of the risk, means "not merely trivial but, generally speaking, one which has a real chance of materialising". (Fallas). This standard lies between the extremities articulated by Ipp JA in the same judgment, namely somewhere between a trivial risk and a risk likely to materialise. However, Tobias AJA recognised that the former standard is no more than a general guide. He went on to say at [92]:-*
>
> > *… for the purposes of the definition of "dangerous recreational activity" in s.5K, the scope of the relevant activity must be determined by reference to the particular activities engaged in by the [plaintiff] at the relevant time, being the period immediately prior to the [plaintiff] suffering the relevant harm as the consequence of the [defendant's] negligence. In other words, …. in determining whether the relevant recreational activity involves a significant risk of physical harm, one must identify that activity at a relatively detailed level of abstraction by including not only the particular conduct actually engaged in by the [plaintiff] but also the circumstances which provide the context in which that conduct occurs."*

> *95 Having regard to this articulation of dangerous recreational activity, and in particular, the objective and prospective nature of the enquiry, the risk of the plaintiff suffering serious injury by diving and/or jumping from the rope swing into water of unknown depth could not be regarded as trivial."*

48. Applying the above analysis, the question of whether "going for a surf" is a "dangerous *recreational activity"* will be a question of fact to be determined by the appropriate forum. There is a vast difference between surfing on a code red day at Teahupo'o or a double overhead day at HT's in the Mentawais (in front of the surgeon's table) and an average beach break at Gunnamatta or Bondi. Equally, it is even more unlikely in the above extreme situations, by reason of the level of experienced surfer participating, that someone would *"drop in"* or be in a situation where a board was abandoned and hit someone *"inside"*. The risks of injury in these circumstances are quite different to the *"obvious risk"* to which, I submit, the legislation is directed. The former is a risk of self-harm to the plaintiff where the only defendant would be God (*Force Majeure*) or the plaintiff's psychiatrist.

49. In *Prast v Town of Cottesloe*,[19] the District Court of Western Australia was dealing with a claim by an Irish tourist who was dumped while body surfing at Cottesloe beach in conditions of a very slight swell, calm sea and no wind and very small waves, 30 to 60 cm or smaller. The plaintiff unfortunately caught a wave that appeared to be no different to other waves but in a split second went down in the water and hit his head on the bottom causing complete tetraplegia. In that case Yates DCJ observed:

> "92. *It is apparent from all of this evidence that the very thing that makes body-surfing fun, that is, the power of the breaking wave carrying the swimmer to shore, is the same thing that makes body-surfing dangerous and creates a risk of injury for the body-surfer. Without the power of the wave there would be no thrill experienced of riding a wave; yet that same power of the wave can on occasion when the wave is a plunging wave throw the body-surfer forcibly to the floor of the ocean. The type of injury (if any) will depend upon prevailing conditions and what part of the body-surfer's body first contacts the ocean floor*
>
> *…*
>
> *100. Based on this evidence, although I am satisfied that the risk of serious permanent spinal injury to a body-surfer if dumped at Cottesloe Beach was remote, I accept that it was not far-fetched or fanciful. It was however an unusual occurrence. Conditions on the day of the plaintiff's accident were mild*

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19 *Prast v Town of Cottesloe* [1999] WADC 116 (12 November 1999)

yet the plaintiff did suffer serious spinal injury. I am satisfied it was a real and therefore a foreseeable risk of injury but fortunately not one likely to occur.

…

110. Body-surfing is a very popular pastime at Cottesloe Beach yet injuries occur relatively infrequently. The risk of serious permanent spinal injury of the nature of that tragically suffered by the plaintiff in this case was, in my opinion, remote. There was no evidence of any case other than this one where such serious permanent injury occurred on Cottesloe Beach. The danger of being dumped by a plunging wave was an obvious risk, inherent in body-surfing. The power of a wave which gives a body-surfer the thrill of being carried to shore can, when the wave is a plunging wave, dump the swimmer on the ocean floor. The experience of being dumped is common among body-surfers and does not usually result in any injury, serious or otherwise."

50. In dealing specifically with the volenti argument raised by the defendant Her Honour observed:

"133. In this case I am satisfied the plaintiff has not fully appreciated the danger involved in body-surfing. Without that appreciation I am not satisfied that he has willingly assumed the risk. (Section. 5(2) Occupiers Liability Act*).*

134. For these reasons the defence of volenti non fit injuria *fails."*

51. The above decision was appealed to the Western Australian Full Court.[20] Ipp J delivered the majority judgment dismissing the appeal. In doing so he observed:

"29. As mentioned, the appellant's contention was that, in order to comply with its duty of care, the respondent should have erected warning signs in the terms I have set out. The respondent, on the other hand, contended that the risk of injury from body-surfing was so obvious that it was not obliged to give any warning as contended for by the appellant. This issue raises questions of fact and law. The factual question is to what extent, if any, is the risk of serious injury from body-surfing obvious. The legal question concerns the effect of the obviousness of the risk on the obligation to take reasonable steps to avoid foreseeable risk of injury.

30 The learned trial Judge answered the factual question by holding that there was no hidden danger, and the danger of being dumped was obvious and inherent in body-surfing. The learned trial Judge distinguished this case from the "diving" cases such as Nagle v Rottnest Island Authority and Inverell Municipal Council v Pennington [1993] A Tort Rep 62,397 (see also City of Rockingham v Curley [2000] WASCA 202) on the basis that the plaintiffs in the diving cases were injured, in effect, by the materialisation of a risk of which they were not aware, whereas the appellant's injury was brought about by an obvious risk inherent in body-surfing.

31 Before dealing further with the appellant's challenge to her Honour's reasoning in this regard, I should mention that, during argument in the course of the

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[20] *Prast v Town of Cottesloe* [2000] WASCA 274 (22 September 2000).

appeal, members of the Court raised with counsel for both parties whether it was open to the appellant to advance a case based on the proposition that body-surfing at Cottesloe Beach was unusually dangerous as the small waves often found there had an unusual capacity of inflicting serious injuries. Counsel for the appellant disavowed reliance on such an argument, however, and senior counsel for the respondent pointed out that a case along these lines was neither pleaded nor presented at trial. It was not suggested at trial, on behalf of the appellant, that there was any aspect of Cottesloe Beach, in regard to its configuration, or the quality of the surf or sea or anything else that resulted in small waves being more dangerous to body-surfers there than anywhere else. Nor was it suggested that the respondent knew or should have known that at Cottesloe Beach there was a particular potential for small waves to cause serious injuries. It follows that the facts necessary to support a case based on any unusual danger arising from body-surfing small waves at Cottesloe Beach was not investigated. The case was presented at trial and on appeal merely on the basis that the risk of suffering serious spinal injuries from body-surfing, generally, was foreseeable, albeit not obvious. I therefore return to the reasoning of the learned Judge in regard to whether the risk of serious spinal injuries from body-surfing, generally, was obvious.

32 *In my opinion, the learned Judge was entirely correct in distinguishing between the circumstances of the diving cases and the circumstances of this case. In the diving cases there were hidden dangers that caused there to be serious risks in performing an act which would otherwise be relatively safe. The risks of striking one's head on submerged rock obscured by the glare of the sun, or on a misleadingly shallow bottom, are not an inherent part of diving. Those were hidden dangers that brought about the need to warn. They are to be contrasted with the risk facing all body-surfers, that is, the risk of being hurled on to the seabed, out of control, by a wave that turns out to be dumper. The risk of so being dumped is inherent in body-surfing itself, cannot be avoided and is well-known. As the learned Judge said:*

> *"I do not consider the force of a wave to be a hidden danger. Any person who body-surfs would necessarily feel the power of a wave if she or he caught a wave and was carried to shore by it. Every witness who had body-surfed including the plaintiff had been dumped by a wave and experienced the force of a plunging wave ... The force of the wave is in my opinion both obvious and inherent in body-surfing."*
>
> *Her Honour observed:*
>
> *"The power of a wave which gives a body-surfer the thrill of being carried to shore can, when the wave is a plunging wave, dump the swimmer on the ocean floor. The experience of being dumped is common among body-surfers and does not usually result in any injury, serious or otherwise."*
>
> *I agree, with respect, with these remarks. Before the appellant sustained his injuries he had, in the course of body-surfing over the years, been dumped as many as a dozen times. In those instances the waves had taken complete control over his movements and, in consequence, parts of his body, particularly his arm and his back, had been forced down on to the ocean floor. As he put it, "It's an involuntary thing". It is also not unusual.*

> *33 Body-surfing is a traditional Australian pastime that has been indulged in by citizens of this country for a very long time. There must be few who have never thrown themselves upon a wave in the hope of being carried by the rush of water to the shore, and there must be few who do not know (from hearsay at least, if not personal experience) what a "dumper" is, and how it can throw a helpless surfer about. This knowledge is generally learned relatively early in childhood and, in any event, is commonsense.*
>
> *34 In many ways, as the learned Judge pointed out, the very aspects of body-surfing that make it dangerous provide the pleasures and thrills that make it popular. The countless numbers of Australians who have body-surfed over the years accept the risk of danger inherent in the activity. As Gleeson CJ said in Agar v Hyde [2000] HCA 41:*
>
> > *"People who pursue recreational activities regarded as sports often do so in hazardous circumstances; the element of danger may add to the enjoyment of the activity. Accepting risk, sometimes to a high degree, is part of many sports."*
> >
> > *It is noteworthy that, as the evidence demonstrates, injury from body-surfing is not a frequent occurrence - despite the risks involved. Nevertheless, unfortunate and tragic accidents do occur, and, sometimes, as in the instant case, in surprising and unexpected circumstances.*
>
> *35 Counsel for the appellant submitted that even if the risk of being dumped is obvious, the risk of sustaining severe spinal injuries is not, and this is the risk that should have been warned against. He argued that the "focus on the 'obvious' danger of being dumped (as distinct from the risk of sustaining serious permanent spinal injury) was misplaced". I am unable to accept this argument. The risk of serious injury should be known to any person who knew what being dumped entailed. All the witnesses who testified described the loss of control that is part and parcel of being dumped. Perhaps the most graphic description was given by the witness who compared the experience with being inside a washing machine. Being hurled about in the sea in shallow water in a downward direction without having any control over one's own motions is a highly dangerous situation. The appellant had personally experienced this several times. The risk of serious spinal injury being caused in these circumstances is patently obvious. If the appellant did not know that body-surfing could cause serious spinal injuries (as he asserted), objectively speaking, he should have known*."

52. In dealing with the obviousness of the risk and the discharge of the duty of care, Ipp J discussed a number of cases including *Romeo v Conservation Commission (NT)*[21] and a number of other cases and observed:

> *"41 … In my opinion, the respondent in this case was entitled, reasonably, to have expected that visitors to Cottesloe Beach would take the risks of body-surfing in*

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21 *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431.

their stride, and to use their own common sense, skill and experience to guard against them.

42 *In Department of Natural Resources & Energy v Harper [2000] VSCA 36 the respondent, a visitor to a forest reserve in a National Park, was injured by a falling tree during a high wind. He claimed that the appellant should have erected signs warning of the danger of hazardous trees in the reserve, particularly in certain weather conditions. Batt JA (with whom Tadgell JA agreed), in holding against the appellant, said:*

> *"First, the danger to be guarded against, that of death or injury from falling trees or limbs, was an obvious one, at any rate in high winds. The appellant was entitled to expect adult residents of Victoria, such as the respondent, to know that trees and limbs of trees in forests, reserves, parks and other places occasionally fall, at any rate in high winds, and do so randomly. It follows that, whatever may have been the state of awareness of ... the camper witness, before the accident, I do not consider that his Honour's statement that it 'could not be anticipated that the users of the Reserve would be likely to be aware of the potential dangers of trees in the Reserve' ... is warranted either by the evidence or by the common course of human experience. To enter a forest or its immediate surrounds, like entering the surf, is to take a risk of injury, albeit a remote risk. The risk is 'endemic' or part and parcel of the recreation of camping, walking and indeed living outdoors in the Australian bush and in particular in reserve forests."*

The aptness of these remarks to the present case are self-evident. The risks of being dumped by the surf and thereby sustaining serious bodily injury are endemic to and part and parcel of the recreation of body-surfing.

43 *Sea conditions often change. Currents, rips and surges unexpectedly materialise. Large and unexpected waves materialise out of the deep. These phenomena are all capable of causing serious injury or death. The currents and rips can take an unsuspecting swimmer far out to sea and result in drowning. Surges and unexpected large waves can hurl an unsuspecting swimmer against rocks or on to the sea shore, with serious damage to body and limb. And yet to suggest that signs should be placed on all beaches in Australia indicating that swimming in the sea could lead to serious injury or death would, I suggest, be absurd. The absurdity lies in the obviousness of the danger that attaches to the common, everyday, activity of swimming in the sea. There is no need to warn of the ordinary risks that are so involved, and it would be absurd to require that to be done. In my opinion, the risks attendant upon body-surfing fall into the same category. Of course, where there are dangerous currents or rips or surges or rocks, or the possibility of occasional "king" waves or other dangers that are peculiar to a particular beach or part of a beach, special warnings may be called for, but that is not this case.*

44 *In my opinion, a local authority charged with maintaining safety at a popular metropolitan beach is not required, in discharge of the duty of care it owes to those who come to swim on the beach, to warn about the risks of body-surfing. Negligence at common law is still a fault-based system:* ***Perre v Apand Pty Ltd*** *[1999] HCA 36; (1999) 73 ALJR 1190 (per McHugh J at 1214). As a matter of law, there is a point at which those who indulge in pleasurable but risky pastimes must take personal responsibility for what they do. That point is*

> *reached when the risks are so well-known and obvious that it can reasonably be assumed that the individuals concerned will take reasonable care for their own safety:* ***Romeo v Conservation Commission of the Northern Territory****.* "

53. In his concurring remarks Wallwark J observed:

> *"58. I agree that the remarks of Batt JA in Department of Natural Resources & Energy v Harper [2000] VSCA 36 which are quoted by his Honour, are apposite to this case. I would compare the risks of body-surfing to the risks undertaken by persons who play rugby or Australian Rules football. There are serious and sometimes catastrophic injuries suffered by the players of those sports. However it is not at law required that warnings of the kind suggested for the appellant in this case be given to the players of those sports."*

54. The distinction to be drawn between the observations in *Prast's* case and my scenarios is that the risk of injury or harm is between the body-surfer and the wave as opposed to the surfer and another surfer who causes the surf-board to become a hazardous object. The nature and seriousness of the risk are quite different I suggest. The defendant in *Prast's* case was sued as the occupier of the beach with the Court finding that there was a duty of care owed but that such a duty had not been breached in the circumstances. I suggest it is highly unlikely that a court would not find that the offending surfers in my scenarios had a duty of care to fellow surfers and in each case would breach that duty as hypothesised. The question then is, is such a risk obvious or inherent?

55. The President of the Queensland Court of Appeal observed in her paper, "Legal Considerations for Beach Safety" November 2007, Surfers Paradise Marriott (Supreme Court of Queensland Library):

> "I am unconvinced the legislative reaction in Queensland and throughout Australia to Justice Ipp's recommendations has simplified, clarified or improved the common law or that it will significantly affect outcomes on liability. … The common law has consistently recognised that to establish negligence a claimant must show fault; those who participate in pleasurable but inherently risky past times (such as surfing) must assume appropriate personal responsibility for risk like being dumped when body surfing outside a flagged area; see *Prast*. On the other hand, this does not necessarily absolve the stake holders from all responsibility as the High Court's decision in *Swain* demonstrates". (page 7)

Conclusion -

56. It can be seen from the above cursory analysis that there is potential for robust litigation should a surfer have the misfortune of being hit by another's board in circumstances where the offender has been negligent. That is not to say such litigation is without the *"obvious risk"* of the plaintiff having to face a number of defences requiring serious consideration and the need for expert evidence from persons as well qualified as our illustrious President, Founder or Northern Patron.

57. I will leave you with the tantalising thought of having to cross-examine Higgins or Strain as to their expertise and experiences, and whether being struck by an aberrant surfboard can be fairly regarded as an obvious risk of the inherent prerequisites for membership of ALSA.

CHRIS WREN S.C.
Patron of the Great Southern Waters
Aickin Chambers