

## NEIGHBOURS IN LAW

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In the law of tort the application of an objective and flexible standard of care accommodates a variety of relationships where there is proximity between the parties and injury is a reasonably foreseeable consequence of the acts or omissions of one person or another.<sup>1</sup> It follows that where there is sporting injury the range of potential defendants may include people other than the occupier of the premises or the club, especially where these other people are engaged in a sports related activity.

### SPORTS OFFICIALS:

Coaches, referees and umpires all exercise some control over the organisation and performance of a game. Their jobs generally include responsibility for the training and supervision of the players or the implementation of the rules and practices of the game. Because they are proximate in law to players they should owe a duty to take reasonable care in the performance of their appointed tasks.

#### (a) *Coaches.*

There are parallels between the relationship of a coach and his players and the relationship of teachers and students. This does not mean that a coach owes a non-delegable duty of care to his charges: rather it refers to the sorts of functions he has control over and, as a result, give rise to a duty to take reasonable care. His job may cover the provision of facilities, instruction, supervision and medical care.<sup>2</sup>

There does not seem to be any precedent in Australia where a coach has been sued, however, as in other areas we are able to obtain some guidance from our American counterparts who have ventured further in establishing the tort liability of the sports official. As an example, in *Vendrell v. School District No. 26C, Malheur County*<sup>2</sup> the injured school boy sued his coach and school for negli-

gence. The court found that the player had undergone extensive training and instruction and because of this the coach had discharged his duty of care. It outlined a coach's responsibility by saying: <sup>4</sup>

No one expects a football coach to extract from the game the body clashes that cause bruises, jolts and hard falls. To remove them would end the sport. The coach's function is to minimise the possibility that the body contacts may result in something more than slight injury.

The above mentioned statement endorses the view formed in *Rootes v. Shelton* that clashes and contacts regarded as being inherent in the game will be taken into account when considering the standard of care owed by a defendant proximate in law to the plaintiff. Where a coach is involved he too has a special relationship with a participant and, the factors relevant to that relationship should be incorporated in the standard of care used to determine whether the coach has fulfilled his duty of care.

In the recent case of *Watson v. Haines*<sup>5</sup> the schoolboy rugby player successfully sued the education authority because it permitted him to play as hooker in the team, which positioning exposed him to neck injury. He was a person with a long thin neck and, according to the medical pundits, this created a risk of serious neck injury when playing as hooker in a rugby match. The education authority had been apprised of the medical opinion and had received strong recommendations against allowing boys of Watson's physique to play hooker. This information had not been adequately disseminated by the education authority to teachers in charge of selecting players in a rugby team. As the case involved the education authority there was a non-delegable duty of care owed by it to the schoolboy.

We can extrapolate from *Watson's* case by drawing on the similarity between a coach's relationship with a player and a school's with its pupils. If a coach is or should have been acquainted with the need to properly select and position players whose physique creates a real risk of injury, failure to observe the warnings from the medical profession must weigh heavily on the question of what standard of care was owed to the player.

(b) *Referees and Umpires.*

Referees and umpires have a less significant relationship with the players until they are required to perform some pre-game function such as inspecting the venue for play or to discharge their duties in respect to the playing of the game itself.

In *Nowak v. Waverley Municipal Council*<sup>6</sup> the League and the club, who were both responsible for allowing the game to be played on an unsafe ground, were amongst the defendants successfully sued by the footballer. This was because they owed the footballer a duty of care in the provision of a suitable venue. They breached this duty by allowing him to play on a ground they knew contained protruding water sprinklers. In making the decision to play on the ground it was the officials of the defendant League and club who were instrumental in designating the ground for play even though there had been a protest from the club's coach in respect to the unsafe condition of the ground.

In Australia we have been comparatively free of actions arising out of sporting injury and, particularly, actions directly involving sports officials. As *Nowak's* case demonstrates, in relation to the sports official, most actions will be directed against the club or employer of the official with a view to obtaining the benefit of any injury insurance available for compensation. However, because an official may be a joint tortfeasor it is appropriate for him and his club to keep this in mind on the question of insurance cover and liability for any judgment for damages. In *Emmett v. Manning*<sup>7</sup> the club was vicariously liable for the negligence of its official in incorrectly sign-posting a course for a car rally. Both the club and the official were defendants.

Melvin Narol has pointed out that up to 1976 there were only ten reported cases in America concerning sports officials. Since then there have been fifty other claims filed, some of which include allegations of negligence.<sup>8</sup>

With regard to a sports official's activities before a game it is generally accepted that, for instance, an umpire or a referee may be required by the rules of the game, or by longstanding practice, to assess whether safe physical conditions exist for playing. Rule 21 of the Victorian Football League's rules and regulations is an example of a rule which may be relevant to the safe playing of

the sport. Rule 21 makes provision for the postponement of matches in the event of unfavourable weather.

Apart from any liability a club may attract for breach of such a rule, any official responsible for compliance with rules relating to the safety of the sporting venue or the supply of equipment may also be personally liable to a player injured as a result of the official's negligence. In the English case of *Harrison v. Vincent*<sup>9</sup> the club's recovery vehicle was parked too close to the race course and contravened a specific rule requiring the road to remain unobstructed for 100 metres. It was reasonably foreseeable that a motor cycle might leave the track and collide with the recovery vehicle and, therefore, the failure to comply with this rule was evidence of negligence on the part of the club and its officials.

Because *Rootes'* case applied a broad test of reasonableness to the rules and contacts inherent in a sport, the breach of any rules or practices may not finally dispose of the question of negligence. However, where a rule is in some way associated with the safe playing of a sport breach of this rule is more likely to and should attract liability to those responsible for its implementation.<sup>10</sup>

Not surprisingly, there is a difference between a sports official's actions performed before the commencement of a game and those performed during the game. Arguably responsibility for pre-game activities, such as determining the venue, checking the equipment and selecting a team should require a higher standard of care because the officials performing these tasks do so away from the turmoil of the game. *Harrison's* case illustrates this difference as against the defendant who was negligent in failing to properly fit and check the braking system on the motor cycle prior to the race. The court distinguished between acts done 'in the flurry and excitement of the sport' and acts done 'in the relative calm of the workshop' applying what it called a modified standard of care to the former and a normal standard of care to the latter.<sup>11</sup>

The application of the neighbour principle to sports officials is consistent with the developments in tort law where a relevant duty of care arises if a relationship of proximity between the plaintiff and the defendant is satisfied.<sup>12</sup> To maintain this consistency it is also necessary to apply the objective and flexible

standard of care to deal with the different circumstances occurring in the organisation and performance of sport. This means that events taking place on the sports field and involving a sports official should be treated differently to those events which occur before the game, creating a variation in the standard of care applied to the official's conduct according to the circumstances.

#### MEDICAL DIAGNOSES AND TREATMENT:

Sports injury is a fruitful area for the expansion of the torts doctrine and liability to a range of defendants, including those associated with the provision of medical diagnoses and treatment. Where medical diagnoses and treatment are concerned the first potential defendant is the legal entity or person conducting the sporting activity, who may owe a duty to provide medical assistance to persons injured as a result of the activity. The other likely defendant is the person providing the diagnosis or treatment to the person injured.

In Australia, so far, those conducting sporting activities and those administering medical care have not faced any reported litigation for their tortious default arising out of a sporting activity. This cannot be because the law of negligence has failed to offer the injured sportsman a remedy or an opportunity to obtain compensation for negligence in the provision of medical assistance. What initiative our plaintiffs lack, the more obliging American legal climate has taken and it is from that country's experiences we can derive some insight into events which may lead to tortious liability in the provision of medical diagnoses and treatment.<sup>13</sup>

(a) *A Duty to Secure and Provide Reasonable Medical Assistance.*

In America persons or organisations in control of sports activities have a duty to secure or provide reasonable medical assistance to injured participants or spectators as soon as possible according to the circumstances. The phrase 'reasonable medical assistance' requires the provision of reasonable facilities and equipment as well as persons with the necessary degree of skill and experience.<sup>14</sup> The test to be applied is clearly an objective one, so that the acts or omissions of, for example, a club hosting a

sporting event should be viewed in the context of the circumstances alleged. To this extent the test mirrors the objective test and standard of care varied according to the circumstances postulated by Kitto J. in *Rootes v. Shelton*.<sup>15</sup>

The leading American case establishing the duty to secure or provide reasonable medical care is *Clark v. State*.<sup>16</sup> The participant in a bobsled race was injured when the sled failed to take a curve. The State controlled and operated the bobsled run, however, the club actually organised the racing and usually provided medical assistance when required. The club was not a party to any subsequent proceedings.

What occurred after the accident was that the State sent medical assistance to the participant and then transported him by an open truck to the bottom of the mountain where it placed him in a truck with a canvas cover. As a result of his prolonged exposure to the cold and before he reached the hospital, the participant suffered circulatory problems in the injured left leg causing gangrene and ultimately requiring amputation of the leg. In his action against the State the participant alleged negligence in the State's failure to provide sufficiently prompt medical care after the accident. Dealing with this claim the court confirmed that 'the State was under a duty to exercise ordinary, reasonable care commensurate with the circumstances.' This was because it had exclusive control over the run and its surroundings. With a history of many prior accidents the State also had a duty 'to furnish reasonable facilities for care of the injured.' Even if it had been under no original obligation to the plaintiff, once it took charge of the injured person, it was required 'to exercise reasonable and ordinary care in performing the task assumed.'<sup>17</sup>

The participant failed because of lack of proof of negligence on the part of the State. Initially the court found that the participant had assumed the risk of both his injuries and the resultant complications.<sup>18</sup> On appeal the court accepted that known dangers of exposure to cold and the possibility of delay in hospitalisation were inherent in the risk assumed. However, it rejected any argument that *volenti* covered delay and exposure due to any negligence on the part of the State.<sup>19</sup>

The response of the court in *Clarke's* case to the argument that the plaintiff had assumed the risk of both his injuries and the resultant complications is reconcilable with *Roote's* case. The High Court in *Roote's* case made it clear that whatever risks were inherent in a sport they did not include risks created by the defendant's negligence and this means that it is not enough for a defendant to say that a plaintiff has assumed all risks including the risk of negligence.<sup>20</sup>

The emphasis in *Clarke's* case is on the need for affirmative action from either persons in control of a sporting venue or, those who conduct an activity which may give rise to injury. The defendant in *Clarke's* case had not normally provided any service or care for the injured participants. This had been assumed by the club. However, the decision of the Appeal court made it clear that the State was on notice of 'the hazardous and dangerous propensities of the bobsled run' and, because of this, had a duty to furnish reasonable facilities for the care of the injured.<sup>21</sup>

Where a person is an occupier of premises pursuant to the Victorian *Occupiers' Liability Act* 1983 there is a general...

Duty to take such care as in all the circumstances of the case is reasonable to see that any person on the premises will not be injured or damaged by reason of the state of the premises or of things done or omitted to be done in relation to the state of the premises.<sup>22</sup>

It is arguable that furnishing reasonable facilities for the care of injured participants and spectators would be viewed as necessary pursuant to the above mentioned Act, particularly where the occupier permitted high risk sports to take place on the premises, such as the stock car racing in *Wilkinson v. Joyceman*.<sup>23</sup> Even without the benefit of the *Occupiers' Liability Act* 1983, the developments in the common law in Australia culminating in the recent case of *Australian Safeway Stores Pty. Ltd. v. Zaluzna* show that occupiers owe a duty to avoid foreseeable risk of injury to entrants on their premises.<sup>24</sup> This must mean that at common law the availability and extent of medical care provided at sporting venues where high risk sports are conducted is a matter to be considered when determining whether an occupier has breached his duty of care to an entrant.

*Clarke's* case also requires a defendant who takes charge of an injured person to exercise ordinary reasonable care in the task

undertaken. If the person involved is an occupier either under the Act or in accordance with the common law the arguments set out above are equally applicable because the occupier takes charge of the injured person and thereby attracts a statutory or common law duty to perform this task with reasonable care.

Where the defendant is not regarded as an occupier of the premises but is, for instance, an organiser of the sports activity, such as a club, a common law duty of care may arise pursuant to the neighbour principle. This duty of care may involve both the need to furnish reasonable facilities for the care of injured athletes and spectators as well as a duty to carry out any task undertaken for the assistance of the injured person with reasonable care. An illustration of circumstances where a coach and the school failed to secure and provide reasonable medical assistance is contained in *Welch v. Dunsmuir Joint Union High School District* where it was alleged and proved that the coach and his employer school had failed to properly care for an injured football player in the interval between him suffering injury and a doctor treating him.

The evidence in *Welch's* case was that, after being fallen on by another player, the plaintiff had been unable to stand up; although he was capable of moving his hands and fingers when asked to do so by the coach. Despite his suspicions that the player had sustained a serious neck or back injury, the coach directed eight other players to carry the plaintiff to the sidelines. After this occurrence the plaintiff was unable to move his hands and fingers and was diagnosed as a permanent quadraplegic. The uncontradicted medical evidence was that there was further spinal damage when the player was moved without a stretcher. On these facts it could be said that those in charge of the injured player had not met the standard of care required in the circumstances.<sup>25</sup>

(b) *The Provision of Medical Treatment.*

In *Welch's* case there was a doctor in attendance during the game. Conflicting evidence was given on whether the doctor had treated the plaintiff on the field before he was moved or once he was placed at the sidelines. Ultimately the court found that the doctor had been negligent in that he failed 'to act promptly after the plaintiff's injury.'<sup>26</sup>

It is implicit in the American court's decision that a doctor of reasonable skill and knowledge would have treated the player promptly and would have instructed that the player be moved from the field in a way designed to avoid further injury.

Medical practitioners have a common law duty to exercise reasonable care and skill in their calling.<sup>27</sup> The principles established by *Welch's* case regarding the standard required of medical personnel are relevant to determining the liability of persons assuming responsibility for the medical care of sports injury.

In Victorian league football it is common for a doctor to be in attendance during a game or training, or for paramedics to be available to attend an injured player to treat him and to determine his fitness to resume play. The people undertaking these jobs all owe a duty of reasonable care to the injured player. Generally speaking the standard of care is referable to the current state of knowledge and approved practice and the qualifications of the person administering the treatment.<sup>28</sup> At the very least a person acting in a medical role is judged by the standard of those who are reasonably skilled and proficient in the activity undertaken. This means that the paramedics administering first aid on the field must conform with a standard of competency consistent with the skills of those reasonably proficient in that task.

It should also be kept in mind that the standard of care may be varied by the circumstances in which a player receives diagnoses and treatment. Hurried first aid on the field and whilst play continues may be relevant to the standard of care applied to those performing the task. This can be contrasted with a doctor's examination of a player to determine his fitness to play at all. In the latter case the circumstances of the examination may require a higher standard of care because the doctor is able to conduct a more thorough enquiry into the player's fitness.

The doctor in *Welch's* case was found to be personally liable to the plaintiff for his negligent conduct. There was no evidence before the court to establish employment or agency between the doctor and the school to make the latter vicariously liable for the doctor's negligence. This would not normally be the case in Australia where it is well established that schools owe a non-delegable duty of care to their student charges<sup>29</sup> and, therefore,

should be liable for the negligence of their delegates, such as doctors and those administering first aid.

With a club or other sporting organisation it may contract with a doctor to attend to those injured by the sporting activity and, in so doing, become vicariously liable to the injured person for the doctor's acts or omissions in the course of his employment. On the other hand, if a plaintiff fails to prove that the club had the power to direct the doctor in his work, or on the facts it did not control his work, the doctor may be viewed as an independent contractor and solely liable for his own conduct.<sup>30</sup>

An example of a case where the employer was vicariously liable for its doctors' negligence is contained in *Rosenweig v. State*. The case involved a claim by the estate of a deceased boxer alleging negligence on the part of the State employed doctors, who permitted the boxer to fight on the night of his death. It appears from the facts of *Rosenweig's* case that in the weeks before his death the boxer had engaged in two fights in which he had knockouts causing injury to his head. The practice was for doctors to suspend boxers for a period of time to avoid the possibility of further trauma to the head. In the interval between the earlier fights and the boxers' last fatal fight he had been examined by a number of doctors all of whom approved his last fight despite their knowledge of his recent history of head injury. Because of this the court found that they had all been negligent in allowing him to fight and the State was vicariously liable for their negligence.<sup>31</sup>

In contrast to the above mentioned case a more recent Canadian case illustrates the sort of circumstances relevant to a doctor being viewed as an independent contractor and solely liable to an injured plaintiff. In *Wilson v. Vancouver Hockey Club*<sup>32</sup> the player sued his club alleging that it was vicariously liable for its employed doctor's failure to refer the player for treatment for a suspected skin cancer. The player failed in his claim against the club because at the time of his examination the court felt that the doctor was acting as an independent contractor and not as a servant of the club. This decision was significantly influenced by the evidence that the doctor was employed to treat hockey injuries. The disability caused by the cancerous mole was not a hockey injury and was unrelated to the player's hockey career.

## DEFECTIVE SPORTS EQUIPMENT:

Sporting injury caused by the use of defective equipment may attract liability to the manufacturer and supplier of that equipment in various ways. The primary concern here is with tortious liability for the negligent manufacture and supply of goods for use in sport and the standard of care appropriate to determining liability. This is aside from any contractual liability between the user and the supplier of the goods and any statutory liability arising pursuant to the Victorian Goods Act 1958 as well as the Commonwealth Trade Practices Act 1974.

The decision in *Donaghue v. Stevenson*<sup>34</sup> is the starting point for the modern law establishing the tortious liability of manufacturers for the negligent manufacture and distribution of defective goods. The plaintiff was the consumer of a bottle of ginger beer contaminated by the remains of a snail. She suffered shock and severe gastro-enteritis and sued the manufacturer, establishing a good cause of action despite her lack of contractual privity with the defendant. Lord Atkin applied the neighbour principle and said:

A manufacturer of goods which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate inspection, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

The application of the neighbour principle in cases where a manufacturer produces and distributes goods for use in sporting contests in Australia requires the same proofs by the plaintiff as are necessary in other product liability cases. Essentially the plaintiff must show negligence; the distribution of the product; an intention that the product reach the user in the same form as when it left the manufacturer; no reasonable possibility of intermediate inspection and knowledge that lack of reasonable care will result in injury.

There are very few decided cases in Australia which specifically concern injuries caused by sport's equipment. However, there are a number of cases from here and overseas illustrating fact situations relevant to deciding whether there has been negligence in the man-

ufacture and distribution of sporting equipment.

In the New South Wales case of *Phillips v. E.W. Lundburg & Son* the plaintiff water-skier was injured when a boat propeller detached from its shaft and pierced his side. The defendant had manufactured the shaft and propeller unit and, some two weeks before the accident, had supplied it to the boat owner. Despite his lack of any contractual relationship with the manufacturer and supplier of the unit, the court found that the plaintiff was owed a duty of care by the defendant. This was because he was one of a group of persons who were so closely and directly affected by the defendant's act that the defendant ought reasonably have had him in contemplation.<sup>35</sup> On these facts the current High Court test for establishing the existence of a duty of care, that is to say proximity and a real risk of injury to the plaintiff, should be satisfied.<sup>36</sup>

A difficulty confronting plaintiffs in actions against negligent manufacturers is the extent to which they must go to establish either negligence in the production or design of the equipment. One of the earliest product liability cases demonstrating this point was *Grant v. Australian Knitting Mills Ltd.*<sup>37</sup> in which the plaintiff carried the rather onerous burden of proving the connexion between his serious dermatitis and some deleterious substance left in the underpants manufactured by the defendant.

The evidence showing the presence of the harmful substance in *Grant's* garment was circumstantial. However, the Privy Council allowed this evidence to be used by the plaintiff to provide a basis for proving negligence in the manufacturing process, in that it found that the manufacturer had failed in its evidence to rebut the inference of negligence arising from the existence of the defects in the garment and the surrounding circumstances.<sup>38</sup>

In *Grant's* case the court applied the doctrine of *res ipsa loquitur*,<sup>39</sup> which applies to tort cases where there is no explanation of how an accident occurred. The doctrine provides a prima facie basis for establishing negligence which can be rebutted by the defendant without him affirmatively proving that he was not negligent.<sup>40</sup>

In *Phillip's* case the water-skier had to rely on the doctrine of *res ipsa loquitur* to establish that there had been negligence and the propeller was in some way defective. The court took up this

argument and said:<sup>41</sup>

This is an accident of a kind which does not ordinarily happen where a propeller and shaft are assembled in a proper and efficient fashion. I find as a fact that the harm would not have occurred had the shaft, the propeller and their components been satisfactorily and carefully assembled. The evidence called by the Defendant fails in my opinion satisfactorily to explain the inferences that are raised in the plaintiff's case. The onus is on the plaintiff from beginning to end but in deciding whether the onus has been satisfied I am entitled to take into account the fact that I do not regard the explanation of the Defendant as adequate.

It is apparent from *Phillip's* case that in many cases involving defective sports equipment the doctrine of *res ipsa loquitur* will be relied upon because a plaintiff is not able to provide evidence of negligence in the production and design of the equipment where the technologically superior manufacturer is in control of this information and expertise.

A manufacturer owes a duty to take reasonable care in the circumstances. Accordingly, the maker of goods, including sporting goods, is not required to produce a product which is accident proof and which will not wear out. In other words the standard of care does not require a manufacturer to be an insurer of goods, although the standard of care should be proportional to the danger involved and may vary according to the circumstances of each case.<sup>42</sup>

In the American case of *Struder v. Riddell Co.*<sup>43</sup> the manufacturer of a football helmet was found not liable to a football player who suffered paraplegia following a head-down tackle of another player. Apart from showing that the player had been properly instructed on the use of the helmet and the dangers associated with its improper use, the evidence also established that there was no practical way of producing a helmet that would be able to withstand the foreseeable energy of an impact.

*Struder's* case applied a standard of strict liability for defective products. Strict liability is now applied in many American product liability cases, allowing a plaintiff to establish his claim without the need to prove fault on the part of the manufacturer. Once it is shown that the equipment is defective then liability is strict. Even with the benefit of the doctrine of strict liability *Struder's* case shows that a manufacturer of sports

equipment is not a complete insurer of the goods. In Victoria with a flexible standard of care a manufacturer would only need to exercise reasonable care in the production and distribution of the sporting goods.<sup>44</sup> Where a protective helmet was concerned then the standard of care required of the manufacturer may vary to reflect any real risk of injury.

If a manufacturer fails to supply goods which would normally resist damage during sporting activity then he is liable to an action for negligence. In the Canadian case of *Dunsmore v. Deshield*<sup>45</sup> the plaintiff was playing touch ball when, as a result of a collision, his glasses broke and injured his eye. He sued for negligence both the manufacturer and the optometrist, who supplied the glasses. The plaintiff had ordered impact-resistant glasses, which had not been supplied and, which he demonstrated would not have broken in the circumstances described. On the evidence both defendants had failed to conduct tests on the lenses before delivery and supply and, therefore, were jointly liable to the plaintiff.

There are many matters which will affect the standard of care to be applied particularly where sporting equipment is concerned. However, the fact that equipment is used in a sporting contest should not of itself reduce or vary the standard of care owed; it should always be a question of fact as to what circumstances alter the standard of care owed. The case of *Harrison v. Vincent* demonstrates this point, where the rider of a motor cycle and his employer were found liable in negligence to the passenger injured in a race. The braking system failed causing the motor cycle to leave the track and strike a recovery vehicle. It was alleged that the defendants had failed to properly fit and inspect the system and were, as a result, in breach of their duty of care to the passenger. The court in *Harrison's* case acknowledged that the standard of care required of the defendants in fitting and inspecting a braking system was not modified in any way by the fact that the plaintiff was competing in a sporting contest. When the defendants fitted and inspected the braking system it was away from the 'flurry and excitement of the sport' and this meant that the standard of care was what the court described as the normal standard of care arising from the neighbour principle.<sup>46</sup>

If the fact that equipment is to be used in a sporting contest increases the risk of injury then more often than not a manufacturer will be required to meet a more rigorous standard of care, particularly where the safety of the competitor is an issue. Accordingly equipment may become defective where a manufacturer fails to provide some safety feature. In *Franck v. Polaris E-Z Co Division of Textron, Inc.*<sup>47</sup> the snowmobile used by the young plaintiff was found to be defective because the manufacturer had failed to supply guards around the moving track. The foot the plaintiff was using to balance herself with was drawn into the underside of the snowmobile and lodged in the moving track.

A manufacturer may produce an intrinsically sound piece of equipment which, because of its complexity, becomes unsafe without some form of adequate warning on its use. The American case of *Prince v. Parachutes, Inc.*<sup>48</sup> is relevant on this point because, apart from a manual accompanying the parachute recommending that only experienced persons use it, there was no warning on the rather sophisticated parachute itself. Inevitably the plaintiff, through inexperience, collided with another parachutist and suffered quadriplegia. The court found that the failure to adequately warn amounted to a defect in the parachute for which the defendant was liable.

*Prince's* case is another case where the doctrine of strict liability came into operation once the defect was established. So far as an Australian court is concerned it is now settled law that a product may be regarded as defective in the absence of a warning on its use and characteristics.<sup>49</sup> The standard of care required from a manufacturer of goods for use in dangerous sports such as parachuting should be higher than that applicable to less harmful sports. In other words, because of the magnitude of the risk, injury to an inexperienced parachutist where there is no direct warning is a foreseeable risk.<sup>50</sup>

One of the arguments raised by the plaintiff in *Vendrell v. School Dist. No. 26 C. Malheur County* was that the equipment provided by the school to play football was defective inasmuch as the helmet and shoulder pads were loose and ill-fitting. It was not the manufacturer but the supplier of the goods who was the defendant and owed a duty of care to the plaintiff user. Apart from showing that

along the chain of distribution anyone who supplies defective sporting equipment is amenable to an action in negligence, *Vendrell's* case relied on the maxim of *volenti non fit injuria*. As the plaintiff was intimately familiar with what was needed for equipment and this was readily available to him he had accepted whatever risk there was in using the loose equipment.<sup>51</sup> This suggests that even if there was any negligence in the supply of loose and ill-fitting equipment, the plaintiff's conduct amounted to a free acceptance of the defendant's negligence and its consequences.

Knowledge of a defect or the prospect of intermediate inspection are matters which, in accordance with the statement of a manufacturer's liability in *Donoghue v. Stevenson*<sup>52</sup> may preclude an action in negligence against a negligent manufacturer. This is sometimes inaccurately referred to as the application of the *volenti* maxim because of the plaintiff's express or implied knowledge of the existence of the defect.

In *Daley v. Gypsy Caravans*<sup>53</sup> the plaintiff electrician, who knew that there was a leak of electricity, was denied damages for the injury suffered when he came into contact with a live current of electricity whilst repairing a defective caravan. There clearly was negligence in the manufacture of the caravan but the court said:

- (a) actual knowledge of the nature of the defect in a manufactured product on the part of the user of that product or
- (b) a knowledge of such defects as a manufacturer is entitled to assume would be gained by an examination of the product before its use by the user or some retail vendor or some other person interposed between the sale of the product and its use will operate to prevent the manufacturer's duty of care from arising.

The law relating to the existence of a relevant duty of care has been the subject of some considerable discussion by the High Court in recent times. A duty of care arises where there is proximity and a reasonably foreseeable risk to another.<sup>54</sup> In order to determine what constitutes reasonable care an objective standard is applied. In *Cook v. Cook* the majority of the High Court explained it thus:<sup>55</sup>

The more detailed definition of the objective standard of care for the purposes of a particular category of case must necessarily depend upon the identification of the relationship of proximity which is the touchstone and control of

the relevant category. Thus,..., if a person were deliberately to agree to allow a blacksmith to seek to mend his watch, the blacksmith would be required to act as a reasonable person should in the circumstances, though he would not be subject to the higher standard of care which would be required of a professional watchmaker. The reason for that is not that the objective general standard required by the law is abandoned. It is that the more detailed definition of the content of that objective standard will depend upon the relevant relationship of proximity from which it flows and into which the reasonable person of the law of negligence must be projected; it "is because that relation may vary that the standard of duty or of care is not necessarily the same in every case..."

In product liability claims it does seem that the directions of the law of negligence require a court to look at the relationship of, for example, a repairer, such as Daley was, and the manufacturer to determine what standard of care was owed to him. This is in preference to the suggestion in *Daley's* case that in some way the plaintiff's knowledge and expertise either prevented the duty of care from arising or gave rise to a voluntary assumption of the risk.

Given the tests presently used by the courts a more sound approach is to say that a person who knows of a defect, is an expert in his field and therefore is aware of the existence of a defect or should have exercised his opportunity to inspect for any defects, has a relation with a manufacturer which may require the standard of care to be varied in the manufacturer's favour. In *Prince's* case if it had been decided in Australia, the duty of care owed by the manufacturer of the parachute would demand a higher standard of care where an inexperienced parachutist was concerned. Conversely, an experienced parachutist may not be able to show that the failure to attach a warning to the parachute caused his injury.

With regard to defective sporting equipment the above mentioned approach is axiomatic. Obviously a person who knows of a defect and makes a free choice to continue to use the defective equipment faces a finding of *volenti* as a defence to any negligence in the manufacture of the goods. On the other hand, the expert may, because of his expertise, have a different relation with the manufacturer and this factor has direct bearing on the standard of care owed when initially deciding whether the defendant was negligent.

NOTES AND REFERENCES:

1. *Jaensch v. Coffey* (1984) 58 A.L.J.R. 426, 440-442; *Cook v. Cook* (1987) 61 A.L.J.R. 25, 27.
2. See John Barnes, *Sports and the Law in Canada* (Butterworths & CO. Canada, 1983), 329; *Vendrell v. School Dist. No. 260 Malheur County*, 233 Ore. 1, 376 P.2d. 406, 413-414 (1962).
3. *Vendrell v. School Dist. No. 260 Malheur County*, 233 Ore. 1, 376 P.2d 406 (1962).
4. *Id.*, 413.
5. *Watson v. Haines* (unreported) Allen J., Supreme court of New South Wales, 10 April 1987.
6. (1984) *Aust. Torts Reports* 80-200.
7. *Emmett v. Manning* (1985) 40 S.A.S.R. 297.
8. Melvin S. Narol, 'Sports Officials and the Law: A Survey of Rights and Potential Liabilities', *International Bar Association's 21st Biennial Conference Papers* (New York, 1986), 3.
9. [1982] R.T.R. 8.
10. See Narol, 13.
11. [1982] R.T.R. 8, 14.
12. *Jaensch v. Coffey* (1984) 58 A.L.J.R. 426, 440-442; *Cook v. Cook* (1987) 61 A.L.J.R. 25, 27.
13. For a discussion of the American authorities see J.C. Weistart and C.H. Lowell, *The Law of Sports* (Bobbs-Merrill Company, Inc. U.S.A., 1979) 982-996.
14. *Clarke v. State* 276 App. Div.10, 93 N.Y.S. 2d. 28, 30 (1949), *aff'd*, 302 N.Y. 795, 99 N.E. 2d. 300 (1951).
15. (1967) 116 C.L.R. 383, 389.
16. 276 App. Div. 10, 93 N.Y.S. 2d. 28 (1949), *aff'd*, 302 N.Y. 795, 99 N.E. 2d. 300 (1951).
17. 93 N.Y.S. 2d. 28, 30 (1949).
18. 195 Misc. 581, 89 N.Y.S. 2d. 132, 139.
19. 93 N.Y.S. 2d. 28, 30 (1949).

20. *Rootes v. Shelton* (1976) 116 C.L.R. 383.
21. 93 N.Y.S. 2d. 28, 30 (1949).
22. Sub-section 14B (3).
23. [1985] 1 Qd. R. 567.
24. (1987) 61 A.L.J.R. 180; 183.
25. 326 P.2d. 633; 636 (Cal. App. 1958).
26. *Id.* 639.
27. *Bolam v. Friern Hospital Management Committee* [1957] 1, W.L.R. 582.
28. *Chin Keow v. Government of Malaysia* [1967] 1 W.L.R. 813, 816-817 (P.C.); but cf. *Albrighton v. Royal Prince Alfred Hospital* (1980) 2 N.S.W.L.R. 542 (C.A.).
29. *Commonwealth v. Introvigne* (1982) 56 A.L.J.R. 749; See also Peter G. Heffey, 'The Duty of Schools and Teachers to Protect Pupils from Injury' (1985) 11 *Mon. U.L.R.* 1, 49-58.
30. *Albrighton v. Royal Prince Alfred Hospital* (1980) 2 N.S.W.L.R. 542 (C.A.).
31. 208 Misc. 1065, 146 N.Y.S. 2d. 589; 597 (1955).
32. *Wilson v. Vancouver Hockey Club* (1983) 5 D.L.R. (4th) 282.
33. Vic: *Goods Act* 1958, Parts & and IV; Cth: *Trade Practices Act* 1974, Part V.
34. [1932] A.C. 562, 599.
35. (1968) 88 (W.N.) (Pt. 1) N.S.W. 166; 172-173.
36. *Jaensch v. Coffey* (1984) 58 A.L.J.R. 426, 440-442.
37. (1935) 54 C.L.R. 49 (P.C.).
38. *Id.* 57 and 61.
39. 'The thing speaks for itself'.
40. *Mummary v. Irvings Pty Ltd* (1956) 96 C.L.R. 99, 116.
41. (1968) 88 W.N. (Pt. 1) N.S.W. 166, 172.
42. *Bull v. Rover Mowers (Aust.) Pty Ltd* [1984] 2 Qd.R. 489; *Lem v. Barotto Sports Ltd* (1976) 69 D.L.R. (3d) 276; but cf. the Victorian *Dangerous Goods Act* 1985 which may apply a statutory standard to the manufacture and supply of explosives and substances

used in sports, such as the sport of shooting, referred to in *Lem's* case.

43. (1984- 1985) *CCH Products Liability Reporter* 10,060.
44. But *cf.* the Commonwealth *Trade Practices Act* 1974 Part V Division 2A which imposes strict liability on manufacturers for defective goods in certain circumstances.
45. (1978) 80 *D.L.R.* (3d) 386.
46. [1982] *R.T.R.* 8; 14.
47. (1984-1985) *CCH Products Liability Reporter* 10,186.
48. (1984- 1985) *Products Liability Reporter* 10.121.
49. *Vacwell Engineering Co. Ltd. v. B.D.H. Chemicals Ltd* [1971] 1 *Q.B.* 88; *Cuckow v. Polyester Reinforced Products Pty Ltd* (1970) 19 *F.L.R.* 122; *Distillers v. Thompson* [1971] *A.C.* 458.
50. See *Wyong Shire Council v. Shirt* (1979-1980) 146 *C.L.R.* 40, 48.
51. 233 *Ore.* 1, 376 *P.2d.* 406; 412 (1962).
52. [1932] *A.C.* 562.
53. [1966] 2 *N.S.W.L.R.* 22; 28.
54. *Jaensch v. Coffey* (1984) 58 *A.L.J.R.* 426, 440-442.
55. (1987) 61 *A.L.J.R.* 25; 27.