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Précis Paper

State of Queensland v Kelly [2014] QCA 27

In this edition of BenchTV, Richard Douglas QC and Dennis Wheelahan QC discuss negligence litigation with particular reference to the Queensland Supreme Court of Appeal's decision in *Queensland v Kelly* [2014] QCA 27. Mr Douglas QC acted as leading counsel for the respondent.

Discussion Includes

- The facts and decision of the Queensland Court of Appeal in *Queensland v Kelly*
- The relevance of signage and warnings in negligence cases
- Causation in cases involving negligent warnings
- Queensland's legislative response to losing the litigation
- Differences in the Civil Liability Act schemes between the States
- Obvious risks and dangerous recreational activities
- The relationship between obvious risk and contributory negligence

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State of Queensland v Kelly [2014] QCA 27

1. In this edition of BenchTV, Richard Douglas QC (Barrister) and Dennis Wheelahan QC (Barrister) discuss negligence litigation, with particular reference to the Queensland Court of Appeal decision in *Queensland v Kelly* [2014] QCA 27 (Fraser JA; Philippides and Henry JJ).

2. Mr Douglas QC was counsel on appeal for Mr Kelly, who succeeded as plaintiff at first instance. The decision was confirmed on appeal.

Material Facts & First Instance Decision before McMeekin J

3. *State of Queensland v Kelly* [2014] QCA 27 is an appeal from a judgment of Justice McMeekin in the Supreme Court of Queensland. Justice McMeekin gave judgment for Mr Kelly in *Kelly v Queensland* [2013] QSC 106.

4. Mr Kelly sued the State of Queensland in negligence after suffering catastrophic injuries at Lake Wabby on Fraser Island. Justice McMeekin found Queensland was liable in negligence for Mr Kelly's injuries, and that Mr Kelly had been contributorily negligent. His Honour assessed contributory negligence at 15 percent (at [160]-[175]).

5. Mr Kelly had been required to watch a video presentation prepared by the Queensland National Parks and Wildlife Service before travelling to Fraser Island. The presentation warned of many of the dangers to visitors present on the Island, including dune driving, dingoes, sharks, and shipwrecks.

6. The video presentation also warned about entering shallow lakes and streams, but this was of a duration of seven seconds, and made no reference to steep sand dunes or to Lake Wabby (at [7]).

7. The plaintiff gave evidence that he had complied with the warnings on the video.

8. On the day of the accident, the plaintiff had walked a 2.5km track to reach the lake. A pictorial sign was located at the start and end of the track, which consisted only of a person diving, and warned of the dangers with 'running' and 'diving'.

9. Mr Kelly ran down the sand dunes bordering the lake, and into the water, about ten times. He did not dive, nor ever intended to do so. However, on the final occasion, he lost his footing, and fell head first into the water striking the bottom, and suffering spinal injury.

10. A more detailed statement of the facts of the case is set out in an appendix to this paper, which is an edited transcript of Mr Douglas QC discussing those facts. The pictorial sign is contained therein.

11. The trial judge found that the sign conveyed to Mr Kelly that the danger principally lay in the act of diving, which he did not do.

12. Queensland argued that the risk was an "obvious risk" within the meaning of s 13 of the *Civil Liability Act 2003* (Qld), in consequence of which s 15 provided no duty to warn arose. The trial judge found that the risk was not an "obvious risk" within the meaning of the Act.

SECTION 13:

Meaning of obvious risk

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

(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.

Examples for subsection (5)—

1 A motorised go-cart that appears to be in good condition may create a risk to a user of the go-cart that is not an obvious risk if its frame has been damaged or cracked in a way that is not obvious.

2 A bungee cord that appears to be in good condition may create a risk to a user of the bungee cord that is not an obvious risk if it is used after the time the manufacturer of the bungee cord recommends its replacement or it is used in circumstances contrary to the manufacturer's recommendation.

SECTION 15:

No proactive duty to warn of obvious risk

(1) A person (defendant) does not owe a duty to another person (plaintiff) to warn of an obvious risk to the plaintiff.

(2) Subsection (1) does not apply if—

(a) the plaintiff has requested advice or information about the risk from the defendant; or …

Issues on Appeal

13. Mr Douglas QC argued that the duty upon the State was to adequately warn Mr Kelly about the dangers inherent at Lake Wabby.

14. Queensland argued the risk in question was a statutory "obvious risk", thereby dispensing with the need for warning and invoking a "dangerous recreational activity" exemption (as set out in ss 17 and 18 of the *Civil Liability Act*).

SECTION 17:
Application of div 4

(1) This division applies only in relation to liability in negligence for harm to a person resulting from a dangerous recreational activity engaged in by the plaintiff.
(2) This division does not limit the operation of division 3 in relation to a recreational activity.

SECTION 18:
Definitions for div 4

In this division—
dangerous recreational activity means an activity engaged in for enjoyment, relaxation or leisure that involves a significant degree of risk of physical harm to a person.

15. The Court of Appeal rejected this characterisation of the risk contended by Queensland.

16. Alternatively, on the basis that the Court of Appeal might find there was no duty to warn, Mr Douglas QC also sought to rely on *Chotiputhsilpa v Waterhouse* [2005] NSWCA 295. In that case, a pedestrian had been run over while attempting to cross the Anzac Bridge. The defendant was found negligent, not on the basis of a failure to warn, but because of the absence of signage that should have provided crossing information to pedestrians as part of the design of the bridge.

17. The Court of Appeal in *Kelly*, however, rejected the argument based on *Chotiputhsilpa*.

18. Mr Douglas QC compares *Kelly* to *RTA v Dederer* [2007] HCA 42; 234 CLR 334, and *Romeo v Conservation Commission of the Northern Territory* [1998] HCA 5; 192 CLR 431.

19. In *Dederer*, the plaintiff suffered injuries after jumping off a bridge commonly used for such activities, despite there being unequivocal warning signs present that prohibited diving. The Court held that the duty owed by a road authority was to exercise reasonable care, but this did not extend to an obligation to prevent harm.

20. *Dederer* is distinguishable from *Kelly*, as the successful argument in *Kelly* was that there was inadequate signage to warn of the risk of injury that the plaintiff suffered. The sign in *Dederer* was unequivocal in character.

21. In *Romeo,* the plaintiff suffered catastrophic injuries after falling off a sea cliff while inebriated, and sued the Conservation Commission for failing to erect fencing. The High Court held that the plaintiff failed. The Court in that case had regard to the associated expenses and aesthetic undesirability of fencing large sections of the Australian coastline, the inherently limited resources available to a public authority, and the low probability of such injury. The Court also found that the risk was an obvious risk, although this case dealt with the common law notion of an obvious risk, rather than the statutory category.

22. The trial and appellate Courts in *Kelly* found that the sign in use was misleading in relation to the risk that was confronted by the plaintiff. The sign had only warned of the risk of diving, but failed to alert the viewer to the risk of the sand dunes giving way.

<u>The Response of the State of Queensland to the Decision of the Court of Appeal</u>

23. The State of Queensland elected not to seek special leave to appeal to the High Court from the Court of Appeal's decision.

24. Rather, in October 2013, the Queensland Parliament enacted various amendments to the *Nature Conservation and Other Legislation Amendment Act (No.2) 2013* (Qld) concerning state parks, forestry reserves, marine parks and similar locations as a response to *Kelly*, to provide the State immunity from civil liability. There are a few exceptions to this immunity.

25. Mr Douglas QC suggests that, had *Kelly* been decided after these statutory exemptions were enacted, Mr Kelly would have failed.

<u>Obvious Risk and Dangerous Recreational Activity</u>

26. Most of the States carry similar provisions relating to duty of care and causation in their respective Civil Liability Acts.

27. All of the states, but not the territories, harbour the "obvious risk" provisions. See ss 5F to 5I of the *Civil Liability Act 2002* (NSW), ss 53 to 56 of the *Wrongs Act 1958* (Vic), ss 13 to 16 of the *Civil Liability Act 2003* (Qld), ss 15 to 17 of the *Civil Liability Act 2002* (Tas), ss 36 to 39 of the *Civil Liability Act 1936* (SA), and ss 5M to 5P of the *Civil Liability Act 2002* (WA).

28. On the other hand, only New South Wales, Queensland, Tasmania, and Western Australia have enacted the "dangerous recreational activity" liability exemption. See ss 5J to 5N of the *Civil Liability Act 2002* (NSW), ss 17 to 19 of the *Civil Liability Act 2003* (Qld), ss 18 to 20 of the *Civil Liability Act 2002* (Tas), and ss 5E to 5J of the *Civil Liability Act 2002* (WA).

29. "Obvious risk" at common law is a risk which, through the focus of the defendant owing the duty of care in question, enquires whether, prospectively, the same ought be characterised as obvious to a person in the position of the plaintiff in question, or a class of which the plaintiff is a member (see *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at [488]). This consideration goes to the probability of occurrence of a risk in the prospect of sense.

30. Under the Civil Liability Acts, the "obvious risk" focus of enquiry is on the injured person, and enquires, prospectively, whether a reasonable person in the position of the plaintiff, ought to have known of the risk which ultimately materialises. If so, that triggers certain statutory consequences, for example dispensing with the duty content extending to warn of that risk or a dangerous recreational activity exemption in respect of that risk.

31. Statutory "obvious risk" does not operate to supplant contributory negligence. Contributory negligence is only adjudicated upon after the court has established breach of duty and causation.

32. As stated above, New South Wales, Queensland, Western Australia, and Tasmania contain a "dangerous recreational activity" exemption in their respective *Civil Liability Acts*. Had the Court in *Kelly* found the risk to be an "obvious risk" within the meaning of the Queensland Act, the dangerous recreational activity exemption (s 19) would have applied to relieve the State of liability.

<u>Fact-based Nature of Most Tort Cases</u>

33. Mr Douglas QC and Mr Wheelahan QC stress that tort cases usually turn on their facts. The focus of inquiry in a negligence case is whether, having regard to all the circumstances, the defendant has exercised reasonable care in respect of a foreseeable and not insignificant risk of injury to a known person or a class of persons to which the plaintiff belongs.

34. It must always be remembered that decisions of fact are not precedents for future cases. Therefore, one should be very cautious in attempting to deduce some overarching approach of the courts to questions of negligence, based on cases decided essentially on factual bases.

BIOGRAPHY

Richard Douglas QC

Barrister, Callinan Chambers, Brisbane

Richard Douglas QC is a past President of the Bar Association of Queensland. He is the lead author of the now third edition text Annotated Civil Liability Legislation Queensland and also Civil Liability Australia, a national loose leaf and electronic LexisNexis service on the Civil Liability Legislation of the Commonwealth and Territories.

Dennis Wheelahan QC

Barrister, Jack Shand, Sydney

Dennis Wheelahan QC has been an Associate Judge of the District Court of NSW and a Common Law Arbitrator and Mediator of the Supreme Court of NSW. He has been a member of the Bar Council of NSW for many years. He was a prosecutor of the Commonwealth Crown Solicitor before entering private practice.

He is a Captain in the Royal Australian Naval Reserve, a Defence Force Magistrate, and a member of the Judge Advocates Panel. Dennis has been awarded the Reserve Forces Decoration and the Australian Military Service Medal.

Mr Wheelahan QC was the Commissioner who inquired into Falcon Airlines and related matters. He has been on the final selection panels for the appointment of Senior Counsel in both NSW and the ACT. He has been a long time member of the adjudicators' panel at the Australian Golf Club, and a judicial officer and chairman and member of the IRB Appeal Panel for Rugby World Cup 2015.

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Wrongs Act 1958 (Vic)

APPENDIX

Edited transcript of Mr Douglas QC discussing the facts of the case

1. At first blush you might think: how did this plaintiff, an Irish tourist in his mid-twenties, manage to succeed against the State of Queensland?

2. Let me not talk about lawyers' skills. I didn't appear at the trial but I did on the appeal for Mr Kelly. The State of Queensland troubled, perhaps understandably, by a verdict in Mr Kelly's favour by the Trial Judge, Justice McMeekin, appealed that finding. They were unsuccessful.

3. The finding at first instance by Justice McMeekin was that the State of Queensland was causatively liable for the injury that befell Mr Kelly. And a very serious injury it was, he suffered tetraplegia. The Trial Judge also found 15 percent contributory negligence.

4. At the time of the incident, Mr Kelly was visiting Australia with a number of home country companions. They were young men who ventured to Australia for a couple of years of fun. Their fun consisted of them going to various places throughout Australia, but, on this occasion, in Queensland, they were on Fraser Island.

5. Fraser Island is the largest sand island in the world, located off the southern Queensland coast. It is also a national park. Many hundreds of thousands of people visit Fraser Island every year. It has many features; beaches, fresh water lakes; beautiful forestry, great fishing. It is a magnet for tourists.

6. One of the attractions, and where this incident occurred, was a place called Lake Wabby. Lake Wabby is a perched freshwater lake. It is a deep lake. On one side it is bordered by a very steep sand hill.

7. Unbeknown to Mr Kelly and his companions, and no doubt the many others who were at Lake Wabby that day, Lake Wabby had been the site of more catastrophic injuries – injuries to people's necks, backs, and the like – than any other place on public land in Queensland. That proved pivotal, I think it is fair to say.

8. It is important what occurred before Mr Kelly's visit. Mindful no doubt of the dangers that exist on Fraser Island, the State of Queensland had published documentary material, and also a video, detailing the dangers for visitors. The State provided that material, particularly the video material, to accommodation service providers adjacent to Fraser Island, that being usually the first port of call of any of these tourists, and that was the case with Mr Kelly and his companions.

9. These service providers were obliged, as part of their licensing, to compel their customers to watch the video. That, Mr Kelly and his companions dutifully did. That video material was produced in its then current form very soon prior to Mr Kelly attending at Lake Wabby and it warned of a myriad of dangers that Fraser Island and places like it present. It mentioned the dangers associate with dingoes. It mentioned the dangers associated with sharks. It warned of the dangers associated with driving on the beach – soft sand and the like. It warned of the dangers of climbing on wrecks. It mentioned some of the dangers associated with waterways very briefly.

10. What didn't it mention? It didn't mention the very thing that the later discovered documentation of the State revealed. Namely, the single most dangerous place in terms of the occurrence of incidents, both on Fraser Island, and indeed on any public land in Queensland, was Lake Wabby.

11. How did the injury occur? Mr Kelly and his companions had been on Fraser for several days. Evidence was given, and this was important as well, that they had complied dutifully with all the warnings that had been given on the video. They had avoided surfing in the surf for fear of sharks. They didn't climb on the Maheno wreck and other wrecks because they had been warned about the dangers of being cut severely. They didn't feed the dingoes. So you can well imagine that evidence being given and accepted both from Mr Kelly and all his companions who gave evidence.

12. Mr Kelly, along with his companions, walked in from the beach. It is about a kilometre or so. It is quite a substantial walk. It was a hot time of the year. Understandably they were pretty bushed, pretty hot, by the time they got in to this inviting place where this deep lake happens to be.

13. There were signs present. The signs were important as well. The signs, uniform in expression, located both at the start of the track and at the end of the track adjacent to the lake, had pictograms on them, consisting only of a person diving – not of a person running but of a person diving. In accompanying language, it warned of danger, and it used language of running and diving. That is important because it had to be understood in the context of someone in the position of Mr Kelly reading that sign and the impression that it gave in terms of the dangers that existed there.

14. The trial judge found that the signage was quite misleading in terms of indicating to Mr Kelly the dangers that confronted him. The finding ultimately of the trial judge, and it was accepted on appeal, was that these signs warned that the danger for Mr Kelly and people like him at that location consisted of diving into the lake. Importantly, Mr Kelly never dived into this lake. He abided the instruction he understood the sign to convey.

15. What he did do was this – and he wasn't the only one. He, all of his companions, and indeed many other people, ran down the steep sand hill into the water. Some visitors did dive, but not Mr Kelly. What he did was, he ran up and down the sand hill. He ran down the sand hill about ten times, running straight into the water. Unfortunately on the tenth occasion he suffered a misfortune. Again, he didn't dive but very close to the water's edge the sand immediately gave way. He lost his footing and involuntarily he was put into a dive mode, went into the water, struck the bed in the shallows, and was severely injured.

16. What was the Judge to make of that? Well the Judge was confronted by a contest as to whether or not there had been breach of duty. I've already told you that he found, and the Court of Appeal agreed, that the signs were quite misleading in terms of what the risk was. They weren't so simple as to say don't run down the sand hills, don't dive. They conveyed, the Trial Judge found that the danger laid principally in him diving, that he didn't do.

17. The case run for the State was that, to a person in the positon of Mr Kelly, for the purposes of the *Civil Liability Act*, the risk that materialised was an "obvious risk". That is a reasonable person in the position of Mr Kelly ought to have known of the risk that he confronted.

18. The trial judge found, having regard to a number of factors, is that it wasn't such a risk. It wasn't a risk of which he knew, namely the sand collapsing and him suffering injury as he did.

19. It was important to understand that the factors that the trial judge took into account were those which, while generally objective in character, bore upon the particular circumstances of Mr Kelly. The trial judge took into account that he when he arrived at that location was misled by the sign. The trial judge took into account that Mr Kelly observed other people doing exactly what he did – run down the sand hill – and some dived without any misfortune whatsoever – Mr Kelly didn't.

20. The trial judge took into account that Mr Kelly, as an Irish tourist, was completely unfamiliar with this sort of locale. The trial judge took into account that Mr Kelly had been misled by the video as well – that this particular risk, or even anything like it, wasn't identified in the State Government's own video, whereas other matters were.

21. His Honour concluded that, for the purpose of the *Civil Liability Act*, there was no "obvious risk", and that there was causative negligence on the part of the State because of the absence of warning in the circumstances, which included the high level of danger historically in this location.

22. His Honour did find 15 percent contributory negligence. He did so on the basis that perhaps Mr Kelly ought to have paid a little bit more attention to the possibility that there may be some risk to him in the circumstances, but that is a different consideration from finding a statutory "obvious risk".

23. The Court of Appeal agreed.

24. One may well ask, would it have been any different had there been no video, had there been no sign? I am sure the answer is in the affirmative, for two reasons – one legal, and perhaps one pragmatic.

25. The legal reason is this. It is unlikely that causative liability would have been found because Mr Kelly wouldn't in those hypothetical circumstances have been misled on two occasions in relation to the dangers here. Remembering that the source of those warnings to his knowledge that he was given were from the State itself. So yes it would have made I think a difference.

26. I said there was a pragmatic aspect to it as well. I have been undertaking litigation of this kind, and generally, for many years, and the reality is this: often there are features in the evidence which can make a judge sit up and take notice. It was plain that the four judges

involved were alerted to the fact that there was evidence as to the significant danger at Lake Wabby, and yet there was no attempt to incorporate that within the video, or make the signs more stark in terms of warning of the dangers of both running down the sand hill and diving.

27. I have already mentioned that the trial judge was Mr Justice McMeekin. His Honour, fortunately I think for Mr Kelly, is one of the most experienced trial lawyers in Queensland. After a long career as a Barrister, both as a junior and Silk, he was appointed to the Bench. He is Supreme Court Judge based in Rockhampton (in Queensland there is a resident Judge in Rockhampton, Townsville and Cairns). He has presided over many trials, mainly generated by the significant commerce that occurs in Central Queensland, including many personal injury cases.

28. The Appeal Court was also an impressive one. The presiding Judge was Justice of Appeal Fraser, who was again a very experienced Barrister, both as junior and Silk, and was appointed directly to the Court of Appeal. His Honour wrote the principal judgement in the case.

29. The other two judges in the case again were two very experienced trial court judges, Justice Anthe Philippides and Justice James Henry. Justice Henry was the northern Judge based in Cairns. Justice Philippides is now a permanent judge of the Court of Appeal. They wrote short concurring judgements, but agreed with the principal judgement of Justice Fraser.

30. I think it is fair to say that I would have been happy to run the matter before any court, but it was a strong coram that decided the case. That may have been one of the considerations that led the State not to seek special leave to appeal to the High Court.