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**A JUDICIAL PERSPECTIVE ON THE
CIVIL LIABILITY ACT 2002 -
TEN YEARS ON**

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INTRODUCTION

- 1 The 80th anniversary of the delivery of the decision of the House of Lords in *Donoghue v Stevenson*¹ will fall on 26 May this year².
- 2 Common lawyers have embraced that decision for many years, perhaps in admiration of its simplicity of principle, and ease of application. As well, practitioners in this state were very comfortable with pleading causes of action for negligence which were, usually, relatively straight forward pleadings.

¹ (1932) AC 562

² The development of my views which are expressed in this paper have been much assisted by the thoughtful input of my former tipstaff Hilbert Chiu, now of the Bar

3 They were directed to responding to the central principle laid down by Lord Atkin in that case. We all remember that he said³:

“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.”

4 The hendiatis which common law pleadings followed was well known and almost formulaic. Statements of claim by plaintiffs tended to include a brief and quite general statement of:

- (1) a duty of care – usually with these words - *the defendant owed a duty to take reasonable care for the safety of the plaintiff*;
- (2) a breach of duty – commonly expressed as - *the defendant failed to take reasonable care*, a statement which was accompanied by the most general of particulars, often themselves a repetition of the allegation of breach; and lastly,
- (3) causation – a simple statement of a conclusion, namely - *as a consequence of the foregoing breach, the plaintiff suffered injury, loss and damage*.

5 Grounds of defence were equally uninformative. Most paragraphs in the statement of claim were responded to by non-admissions, with the allegation of breach of duty usually denied. In my experience, more effort was put into pleading the particulars of contributory negligence than any other part of the defence.

6 Letters of particulars which might actually elucidate the details of a cause of action were simply seen as part of the ongoing game of keeping as much information from the other side as was possible, at least until final addresses when the real case on either side was likely to emerge. The most common answer to a request for particulars to be found in any common law case was “ ... *this is a matter for evidence and not particulars*... “.

³ *Donoghue* at 580

7 The Courts made plain their disapproval of this method, which was essentially one of trial by ambush. The comments of Heydon JA (as his Honour then was) in *Nowlan v Marson Transport Pty Ltd*⁴ are well known. Allsop P when a judge of the Federal Court of Australia, specifically disapproved of the “sporting theory of justice”⁵ and said:

“In the long run, the only consequence of keeping issues hidden or not *clearly* identifying them is to disrupt the business of the court leading to the waste of valuable public resources and to lead to the incurring of unnecessary costs by the parties, costs which ultimately have to be borne by someone.”

8 This generality of approach led to a number, perhaps large, of idiosyncratic decisions and suggestions of, at least, unpredictability, if not irrationality, in results.

DISAFFECTION

9 By about 2001, insurers in particular and governments more broadly had become disaffected with the law of torts and decision making by the Courts

10 The sense of that disaffection can be found in a comment, fortunately *obiter*, of Chief Justice Spigelman, who in 2001 suggested that, in many respects, the tort of negligence was:

“...the last outpost of the welfare state”⁶

11 He suggested, in that decision, that changes in society’s expectations about persons accepting responsibility for their own actions ought be reflected in the identification of a duty of care for the purposes of the law of negligence. He went on to repeat this phrase in a seminal address to the Judicial Conference of Australia in April 2002⁷.

⁴ *Nowlan v Marson Transport Pty Ltd* [2001] NSWCA 346; 53 NSWLR 116

⁵ *White v Overland* [2001] FCA 1333 at [4]

⁶ *Reynolds v Katoomba RSL All Services Club* [2001] NSWCA 234; 53 NSWLR 43 at [26]

⁷ Address By The Honourable J J Spigelman AC: “Negligence – The Last Outpost Of The Welfare State”. The Judicial Conference Of Australia: Colloquium 2002 Launceston, 27 April 2002

12 Professor Harold Luntz, in the forward to the 4th edition of his work, responded to the suggestion that the tort of negligence was an outpost of the welfare state by saying⁸:

“No welfare state would ever have created a system, so irrational, expensive, wasteful and discriminatory.”

13 Faced with an apparent, rather than real, insurance crisis and mounting public pressure, governments were persuaded to amend tort law. All governments in Australia, in July 2002, supported an inquiry into a review of the law of negligence. The Ipp Review, as it came to be known after its principal author, the Honourable David Ipp QC, had as a commencement point, the Terms of Reference. Those terms commenced in a way, which seems to me to adequately encapsulate the views of the governments of the day. The terms said this:

“The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.”

CIVIL LIABILITY ACT 2002

14 The NSW Government introduced changes to the common law in two parts. The first, the *Civil Liability Act 2002*, was assented to on 18 June 2002 and was deemed to have commenced on 20 March 2002 – just over 10 years ago.

15 The second tranche of reforms was the *Civil Liability Amendment (Personal Responsibility) Act 2002* which was assented to on 28 November 2002 and commenced on 6 December 2002, with some exceptions.

WHAT HAS HAPPENED SINCE THE CIVIL LIABILITY ACT HAS BEEN INTRODUCED?

16 The High Court of Australia has delivered a number of very significant judgments directly dealing with particular provisions of the Act. The NSW Court of Appeal has determined a very large number of cases. So important is the Act, that the

⁸ Luntz, *Assessment of Damages for Personal Injury and Death*

Court of Appeal has a web page which refers to the Act and provides annotations to sections of it complete with an up to date reference to decisions of the Court dealing with those sections.

- 17 Many of the provisions of the Act has been scrutinised and discussed and ultimately judicially determined. Many more remain to be the subject of judicial exposition.
- 18 The Court of Appeal has been particularly critical of trial judges, and counsel, who do not refer to the Act in the course of arguing, and then determining, a case,

WHAT HAS NOT HAPPENED?

- 19 To my observation, speaking generally, members of the legal profession, and the common law Bar, have not yet adjusted their outlook to fully embrace the Act. Personal injury practitioners are still far more comfortable with the common law as it used to be.
- 20 In one personal injury action which I heard in 2010, neither the pleadings, nor counsel in their submissions, referred to any provision of the *Civil Liability Act*, except with respect to damages. The liability aspects of the case were dealt with as though the Act did not exist. This, I suggest, is hardly satisfactory.
- 21 In particular, since I have been a member of the Supreme Court bench, I detect whilst reading pleadings in matters for which I have case management responsibilities and those which I hear, that the provisions of the *Civil Liability Act* are completely ignored in the pleadings (both statements of claim and defences) or else the pleadings fail to address the really significant provisions of the Act.

22 I will shortly come to some specific issues of pleading, but may I commence with some general remarks about the impact on the tort of negligence of the provisions of the *Civil Liability Act*.

CIVIL LIABILITY ACT – BREACH OF DUTY

23 In making these remarks, I commence with the proposition that the *Civil Liability Act* was not intended to be a complete code. In understanding its terms, and in its practical application, it is essential to recognise that the Act exists in the context of the tort of negligence and the common law which has developed over the years.

24 Any understanding of the impact of the provisions of the Act must commence with Part 1A of the Act entitled “Negligence”. Although s 5B is found under the heading “Duty of Care”, it clearly deals with breach of duty. It reads:

“5B General principles

- (1) A person is not negligent in failing to take precautions against a risk of harm unless:
 - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
 - (b) the risk was not insignificant, and
 - (c) in the circumstances, a reasonable person in the person’s position would have taken those precautions.

- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):
 - (a) the probability that the harm would occur if care were not taken,
 - (b) the likely seriousness of the harm,
 - (c) the burden of taking precautions to avoid the risk of harm,
 - (d) the social utility of the activity that creates the risk of harm.”

25 In considering the effect of section 5B, one is obliged to have regard to section 5C, which is in these terms:

“5C Other principles

In proceedings relating to liability for negligence:

- (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and
- (b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and
- (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.”

26 Although both of these sections in the *Civil Liability Act* appear beneath the heading “Duty of Care”, they are evidently directed to questions of breach of duty: *Adeels Palace Pty Ltd v Moubarak*⁹. It is to be observed that there are no specific provisions dealing with how a duty of care arises, except to the extent that the requirements for proving a breach inform that issue. The common law prevails on the issue of the existence of a duty. I will say a little more about that issue when dealing with some remarks on pleading.

27 But, any analysis of the impact of the *Civil Liability Act* upon the common law commences with an acknowledgement that there are a number of separate steps that must be taken to establish a breach of duty under the Act.

28 As a starting point, a plaintiff must identify and clearly articulate the “risk of harm” against which it is alleged a defendant would be negligent for failing to take precautions. Section 5 of the *Civil Liability Act* defines “harm” as meaning “harm of any kind, including ... (a) personal injury or death, (b) damage to property, [and] (c) economic loss”.

29 It is essential to consider this chapeau as the starting point and to carefully identify the particular risk of harm to which all of the later steps will be applied. As the judgment of Gummow J in *RTA v Dederer*¹⁰ clearly demonstrates, it is only through the correct identification of the risk that an assessment can be made of the

⁹ (2009) 239 CLR 420 at [13]

¹⁰ (2007) 234 CLR 330 at [59]-[61]

defendant's knowledge of the specified risk of harm, of the probability of that risk occurring, and to evaluate the reasonableness of the defendant's response, or lack of response, to that risk. This avoids the type of error discussed by Gummow J in *Dederer*.

30 At this stage of the inquiry, and before any consideration of causation (as provided for in s 5D of the Act), it seems to me that it may be sufficient if the risk of harm is described as a class of injury, as distinct from the particular injury actually suffered by the plaintiff. This approach accords with the traditional common law approach: *Chapman v Hearse*¹¹; *Mount Isa Mines Limited v Pusey*¹².

31 The next step is to address each of the three elements in s 5B(1) of the Act.

32 As I have said, section 5B presupposes the existence of the law of negligence and operates against its background: *RTA v Refrigerated Roadways Pty Limited*¹³. But the statute requires that a plaintiff satisfy the court that each of the elements in s 5B(1) are proved before a finding of a breach of duty can be made¹⁴.

33 As the Ipp Report noted, the three separate elements in s 5B(1) represent the concepts of foreseeability, probability and reasonableness of precautions¹⁵. These concepts are each represented in the common law, and are often conflated in the term "reasonable foreseeability" but the statute now makes it clear that each must be separately addressed.

34 Basten JA in *Drinkwater & Ors v Howarth*¹⁶ notes that there may be a difficulty in treating each of these elements as separate and divisible. However, that judgment does not seem to me to suggest that the separate elements can, or ought be ignored as the statute requires.

¹¹ (1961) 106 CLR 112 at 121

¹² (1970) 125 CLR 383 at 390 per Barwick CJ, at 403 per Windeyer J, at 414 per Walsh J

¹³ [2009] NSWCA 263; 77 NSWLR 360 at [173] per Campbell JA (McColl JA agreeing)

¹⁴ *Refrigerated Roadways* at [442]-[444] per Sackville JA

¹⁵ Ipp Report, para 7.11

¹⁶ [2006] NSWCA 222 at [21]

- 35 The first element is that a plaintiff must establish that the risk of harm was foreseeable to the defendant. Foreseeability is described in the statute differently from the common law description. Section 5B(1)(a) describes a foreseeable risk as a risk of which the defendant knew or ought to have known. A plaintiff must establish either actual knowledge in the defendant of the risk of harm, or else constructive knowledge (that is, the defendant ought to have known) in the defendant of the risk of harm.
- 36 The Ipp Report was the source of the provision of the Civil Liability Act under discussion. In para 7.10, the following remarks were made:
- “Whereas probability is a scientific concept, foreseeability is a matter of knowledge and inference. For instance, no matter how likely it is that something will occur, it is foreseeable by a person only if that person knows or ought to know that it might occur. (Knowledge must be judged as at the date of the alleged negligence and not at a later date; that is, without the benefit of hindsight and ignoring subsequent increases in knowledge about the risk and its consequences.”
- 37 The establishment, by a plaintiff, of constructive knowledge in the defendant of the risk of harm necessarily depends upon all of the facts, matters and circumstances which were known to the defendant or else ought to have been known to it. Matters which may impact upon the drawing of an inference as to knowledge of a defendant may include such things as the common knowledge and experience of others in similar positions to the defendant, public notoriety of a particular risk of harm, publications containing academic exposition of risk which might be expected to be read by people in the position of the defendant, and as well, the obviousness or likelihood of an event happening when applying common sense.
- 38 It is important to emphasise however that knowledge, whether actual or constructive, must be judged as at the date of the alleged negligence and not at a later date; that is, without the benefit of hindsight and ignoring subsequent increases in knowledge about the risk of harm and its consequences.
- 39 The second element, which is cumulative on the first, is whether the alleged risk of harm was “... *not insignificant*”. This must be judged from the perspective of a

reasonable person in the defendant's position, and in prospect, not retrospect:
*Stojan v Kenway*¹⁷ .

40 There have been a number of decisions of the Court of Appeal that have considered this phrase. It is fair to say that the phrase “not insignificant” has not yet been the subject of any comprehensive detailed analysis. In *Waverley Council v Ferreira*¹⁸, Ipp JA (with whom Spigelman CJ and Tobias JA agreed) held that the particular risk was not insignificant but there was no discussion of why that was so. Similar findings, without discussion, have been made in a number of other Court of Appeal decisions¹⁹ .

41 In *Refrigerated Roadways*, Campbell JA²⁰ raised, but did not decide, a question of whether there was any difference in substance between the common law test of a risk coming to fruition as being “... not far-fetched or fanciful” and the statutory test “... not insignificant”.

42 In *Shaw v Thomas*²¹, Macfarlan JA²² said that the statutory test was more demanding than the common law test, “but ... not by very much”.

43 The Ipp Report at para 7.15 described the recommended change in this way:

“The Panel favours the phrase ‘not insignificant’. The effect of this change would be that a person could be held liable for failure to take precautions against a risk only if the risk was ‘not insignificant’. The phrase ‘not insignificant’ is intended to indicate a risk that is of a higher probability than is indicated by the phrase ‘not far fetched and fanciful’, but not so high as might be indicated by a phrase such as ‘a substantial risk’. The choice of double negative is deliberate. We do not intend the phrase to be a synonym for ‘significant’. ‘Significant’ is apt to indicate a higher degree of probability than we intend”.

44 On this aspect of the Act, the Premier of NSW said in his Second Reading Speech when debating the Bill:

¹⁷[2009] NSWCA 364 at [136] per McColl JA.

¹⁸ [2005] NSWCA 418 at [69]

¹⁹ *Bostik Australia Pty Ltd v Liddiard & Anor* [2009] NSWCA 167 at [92]ff per Beazley JA; *Rhodes v Lake Macquarie City Council* [2010] NSWCA 235 at [42] per Hodgson JA (with whom Macfarlan JA and Handley AJA agreed)

²⁰ at [186] (McColl JA agreeing)

²¹ [2010] NSWCA 169

²² at [44] (Beazley and Tobias JJA agreeing)

“We have adopted the approach in the Ipp Report A risk has to be not insignificant before a court can find that it was reasonably foreseeable. This will send a clear message to the courts that, under the current common law, liability for insignificant risk is too easily imposed. Our new formulation will emphasise the community’s reasonable expectation that people should have to guard only against risks that are a real possibility.”

45 Spigelman CJ speaking extra judicially at Lincoln’s Inn, London on 16 June 2004, said of the phrase “not insignificant” this:

“The not ‘far fetched or fanciful’ test for foreseeability has been replaced by a test that a risk be ‘not insignificant’ which, despite the double negative, is of a higher order of possibility.”

46 I will now attempt to draw together this variety of sources to state what approach, in my opinion, is the appropriate one to interpreting the phrase “not insignificant”:

- (a) The assessment of the risk of harm is one made in prospect and not retrospect. Hindsight has no part to play;
- (b) The phrase is of a higher order than the common law test, and this was intended to limit liability being imposed too easily;
- (c) The phrase “not insignificant” is intended to refer to the probability of the occurrence of the risk;
- (d) In the realm of tort law, the probability of an occurrence is both a quantitative measurement, which may, but does not necessarily reflect a statistical and numerical assessment, and also an evaluative measurement. The statutory phrase is a protean one which depends upon the context of facts, matters and circumstances for its meaning;
- (e) Whether a risk is “not insignificant” must be judged from the defendant’s perspective and must be judged on a broader base than a mere reductionist mathematical formula.

47 The third element of s 5B which requires attention is the conduct of a reasonable person. This element is perhaps the one which most closely reflects the common law: *Refrigerated Roadways*²³. Any consideration of this element also requires attention to the provisions in s 5B(2) of the Civil Liability Act.

48 In my view, the statute requires specificity about the precautions that should have been, but were not taken. This is so because what needs to be proved is that the conduct of the defendant was unreasonable. If one does not know what it is that the defendant ought to have done, it is not possible for a court to reach any conclusion about the defendant’s conduct.

²³ at [177] per Campbell JA

- 49 Section 5B(2) provides a non-exhaustive list of factors which a court is required to take into account in deciding if this step is made out: *Refrigerated Roadways*²⁴.
- 50 Section 5C, in part, also casts light upon the non-exhaustive list of factors in s 5B(2). In particular, s 5C(a) notes that the burden of precautions is not to be narrowly construed but must have regard to the burden of taking precautions against other similar risks of harm. This reflects the remarks of Bryson J in *Waverley Council v Lodge*²⁵.
- 51 Section 5C(b) seems also to reflect the remarks of Handley JA in *Ainsworth v Levi*²⁶. His Honour there held that the mere fact that there was an alternative method of undertaking the relevant conduct did not furnish any evidence of negligence let alone demonstrate that it was, thereby, established for a failure to take the alternative course.

CIVIL LIABILITY ACT – CAUSATION

- 52 The common law test for causation is no longer the relevant test because s 5D of the Civil Liability Act deals exclusively with the issue of causation²⁷.
- 53 The terms of s 5D warrant attention:

“5D General principles

- (1) A determination that negligence caused particular harm comprises the following elements:
- (a) that the negligence was a necessary condition of the occurrence of the harm (*factual causation*), and
 - (b) that it is appropriate for the scope of the negligent person’s liability to extend to the harm so caused (*scope of liability*).

²⁴ at [173] per Campbell JA; [445] per Sackville AJA; see also *Erwin v Iveco Trucks Australia* (2010) 267 ALR 752 at [81] per Sackville AJA (Basten and Campbell JJA agreeing).

²⁵ [2001] NSWCA 439 at [35]-[36].

²⁶ (Court of Appeal, 30 August 1995, unreported)

²⁷ *Travel Compensation Fund v Tambree t/as Tambree and Associates* [2005] HCA 69; 224 CLR 627 at 642-643 [45] (per Gummow and Hayne JJ); *Adeels Palace* at [41], [44];

(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

...

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.”

54 Section 5D requires that attention first be given to the identification of the “particular harm” which it is said the plaintiff has suffered and to ask whether that particular harm was caused by the offending negligence which is the subject of the proceedings. The phrase “particular harm” is quite different from the phrase “risk of harm” used in s 5B of the Act about which I have spoken earlier because it refers to the harm which has in fact materialised which forms the basis of the consideration of causation.

55 In proving causation in an ordinary case in accordance with s 5D(1) of the Act, a plaintiff must prove that the negligence alleged was “... *a necessary condition of the occurrence of the harm*”. This is referred to as factual causation.

56 It is now well established that factual causation is to be determined by the “but for” test in all cases: *Adeels Palace*²⁸ ; *Wilson v Nilepac Pty Ltd*²⁹ . Where there are multiple possible causes not all of which are negligent, a plaintiff must demonstrate that it is more probable than not, that but for the negligence of the defendant, the accident and injury would not have occurred³⁰.

57 At common law, it was sufficient for causation to be satisfactorily proved by a plaintiff if a material contribution to a particular injury had occurred. In *Bendix Mintex Pty Ltd v Barnes*, Mason P said³¹ :

²⁸ at [55]

²⁹ [2011] NSWCA 63 at [132] per Tobias JA (Beazley JA agreeing)

³⁰ *Amaca Pty Limited v Ellis* (2010) 240 CLR 111 at [10]-[13]; *Zanner v Zanner* [2010] NSWCA 343 at [2], [11] per Allsop P (Young JA agreeing).

³¹ (1997) 42 NSWLR 307 at 311

“It is sufficient for a plaintiff to establish that his or her injuries were ‘caused or materially contributed to’ by the defendant’s wrongful conduct: *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 514.”³²

- 58 A definitive answer to the question of whether causation in accordance with s 5D includes a material contribution as a sufficient cause awaits the decision of the High Court of Australia which is presently reserved in the matter of *Woolworths Ltd v Strong*.
- 59 It is my personal view that although s 5D, rather than the common law, sets out the test for causation, that does not mean that the common law does not have any work to do, in an understanding of the section.
- 60 Section 5D(1) uses the phrase “... *negligence caused particular harm* ...” when describing the determination which must be made by a court. At common law, and in common legal usage, the term caused would ordinarily be understood to include the words “... *caused or materially contributed to* ...”.
- 61 Section 5D(2) uses the phrase when considering an exceptional case: “... *in accordance with established principles* ...”. The context and meaning of this phrase, used in this subparagraph, acknowledges so it seems to me, that the traditional understanding of causation as including not just a cause but also a material contribution is included within the section.
- 62 As well, the two part test posed by s 5D(1) and also the exceptional case test, posed by s 5D(2), bear close resemblance to the analysis favoured by McHugh J in *March*³³. It was an integral feature of that discussion, that the law regarded a material contribution as sufficient to amount to a cause. As McHugh J said³⁴:

“... the common law has been forced to reject the application of scientific and philosophical theories of causation ... Lawyers, and particularly academic lawyers, however, have modified [John Stuart] Mill’s theory of causation and adopted it for legal purposes. The adaptation of Mill’s theory holds that every necessary member of the set of conditions or

³² See also *Duyvselshaff v Cathcart & Ritchie Ltd* (1973) 47 ALJR 410 at 417A per Gibbs J; *Chappel v Hart* (1998) 195 CLR 232 at [27] per McHugh J.

³³ at 530 and 531

³⁴ *March* at 529

relations which is sufficient to produce the relevant damage is a cause of that damage ...”.

63 My personal point of view is contrary to the obiter dictum of the Court of Appeal in *Woolworths Ltd v Strong*³⁵ which expressed the view that material contribution had no place in the consideration of s 5D(1). Campbell JA said:

“Material contribution”, and notions of increase in risk, have no role to play in s 5D(1). It well may be that many actions or omissions that the common law would have recognised as making a material contribution to the harm that a plaintiff suffered will fall within s 5D(1), but that does not alter the fact that the concepts of material contribution and increase in risk have no role to play in deciding whether s 5D(1) is satisfied in any particular case.

64 I hope that the decision of the High Court will provide guidance in this area.

65 Finally, in considering the statute as it affects causation, it is appropriate to note s 5E which provides:

“5E Onus of proof

In determining liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.”

66 This section also effects an explicit change to the common law. The change effected is to fill evidentiary gaps by shifting the onus of proof in the area of causation³⁶.

PLEADINGS

67 I wish, in coming to a conclusion of this lecture, to make some remarks about appropriate pleadings in cases which involve causes of action affected by the *Civil Liability Act*.

³⁵ [2010] NSWCA 282 at [48] per Campbell JA, Handley AJA and Harrison J agreeing

³⁶ *Zanner v Zanner* [2010] NSWCA 343 at [7] per Allsop P

68 I commence by reminding you of the salient features of pleadings, whether a statement of a claim or a defence, as required by both the common law and by the Uniform Civil Procedure Rules 2005. In *Dare v Pulham*³⁷ the High Court described the purpose of pleadings in this way:

“Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it ... they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial ... and they give a defendant an understanding of a plaintiff’s claim in aid of the defendant’s right to make a payment into court. ... [T]he relief which may be granted to a party must be founded on the pleadings ...”

- 69 According to the provisions in the Uniform Civil Procedure Rules, pleadings:
- (a) must contain only a summary of the material facts on which the party relies and not the evidence by which those facts are to be proved: UCPR 14.7;
 - (b) must plead specifically any matter that, if not pleaded specifically, may take [the other party] by surprise: UCPR 14.14(1) and (2);
 - (c) the defendant must plead specifically any matter that makes any claim or other case of the opposite party not maintainable or that raises matters of fact not arising out of the preceding pleading: UCPR 14.14(2);
 - (d) a pleading must give particulars of any claim, defence or other matter as are necessary to enable the opposite party to identify the case that the pleading requires him or her to meet: UCPR 15.1.

70 I also draw attention to the provisions of UCPR 15.5 as far as they affect personal injury litigation. It is not necessary to further elaborate on that Rule.

71 As I have said, it is uncommon in my experience, currently, for a pleading alleging a tortious cause of action to specifically embrace the terms of the *Civil Liability Act*.

³⁷ [1982] HCA 70; 148 CLR 658 at 664

PLEADING - DUTY OF CARE

- 72 As my earlier remarks indicated the existence of a duty of care is not directly addressed by the provisions of the *Civil Liability Act*. The common law recognises that particular relationships will give rise to a duty of care: one road user owes another road user a duty to take reasonable care, an employer owes to an employee a duty, amongst other things, to provide and maintain a safe system of work, a doctor owes to a patient a duty to exercise reasonable care and skill in the provision of professional advice and treatment and a school authority owes a duty to a school pupil. There are other recognised categories.
- 73 In cases involving these recognised categories, it will usually be entirely adequate to plead the fact of, and the existence of, the relationship, and then to plead the content of the duty which is alleged.
- 74 However, in cases which do not involve relationships recognised by the common law, then a pleader will need to consider whether any of the other indicia of a duty exist, and if they do so, to plead the material facts which demonstrate the existence of the indicia.
- 75 Various indicia of the existence of a duty are not limited to, but may include³⁸ :
- (a) reasonable foreseeability of loss;
 - (b) autonomy of the individual;
 - (c) vulnerability of a person to a risk of harm;
 - (d) extent of possible liability;
 - (e) defendant's knowledge of a risk and its magnitude; and
 - (f) the existence of statutory powers to take action.
- 76 Where it is necessary to invoke any of these indicia, they must be pleaded as must the material facts upon which those conclusions are based.

³⁸ See *Perre v Apand Pty Ltd* [1999] HCA 36; 198 CLR 180 per McHugh J at [105], Gummow J at [201]

PLEADING - BREACH OF DUTY

77 In my opinion, where the provisions of the *Civil Liability Act* apply, a proper pleading by a plaintiff who alleges a breach of a tortious duty must include the essential chapeau and each of the elements to which I have earlier made reference. They are:

- (a) a statement of the particular risk of harm against which it is said the defendant should have taken precautions;
- (b) an allegation that the risk was a foreseeable one because it was actually known to the defendant, together with particulars of how that is to be proved; or
- (c) an allegation that the risk was a foreseeable one because it ought to have been known to the defendant, together with particulars of how that is to be established;
- (d) an allegation that the risk was not insignificant. In my view that allegation should be accompanied by particulars of the basis upon which it is said that that is so. Alternatively, a plaintiff may, upon request, have to provide those particulars by letter;
- (e) An allegation that a reasonable person in the defendant's position would have taken specific precautions against the risk of harm, which allegation must be accompanied by an identification specifically of the precautions which it is said ought to have been taken.

78 It will, ordinarily, be insufficient for a proper pleading to plead a breach of duty without including each of these particulars

79 I draw attention to this final element which I have just referred to. It is common for a particular of negligence to be expressed very generally, for example, failing to do all things necessary to keep the plaintiff safe, or perhaps, driving without due care. These are mere statements of a breach of duty at common law. They are not particulars of what it is claimed that a defendant should have done. Under the

Act, in my view, such particulars would not suffice to adequately plead a breach of duty.

PLEADING - CAUSATION

80 To plead that the damage was caused by the breach of duty, as is now common, would not adequately plead the necessary elements of establishing causation under the *Civil Liability Act*.

81 That is for a number of reasons. First, a plaintiff needs to decide which of either s 5D(1), or s 5D(2) he or she intends to rely upon. A glance at those two subsections will indicate that they are quite different.

82 Having made that decision, then what needs to be pleaded will become clear. In a claim involving s 5D(1), which is likely to be the majority of cases, an allegation that factual causation has been established will need to include the pleading that *but for the negligence* the identified particular harm would not have occurred.

83 As well, there should be included “a scope of liability” allegation, namely that it is appropriate for the defendant’s liability to extend to the plaintiff’s harm. Unless that is specifically pleaded, a defendant is denied the opportunity to put that factor in issue.

PLEADINGS - DEFENDANTS

84 Time does not permit, in this lecture, a discussion about the specific pleading requirements of the *Civil Liability Act* so far as defendants are concerned. That will have to wait for another time.

85 But it would be remiss of me not to point out that the existence of the various defences, and other shields created by the Act, all need to be specifically pleaded. They would, speaking generally, be matters which if not pleaded would take the

other party by surprise. They also affect the range of evidence which needs to be gathered for trial.

CONCLUSION

86 The *Civil Liability Act* has changed the landscape for personal injury claims. The Act was intended to reduce the number and range of such claims which were successful.

87 In my view, personal injury practitioners will contribute to, and perhaps exacerbate, that reduction unless careful attention is paid to the terms of the Act, and the pleadings relied upon to reflect it.