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VOLUNTARY ASSUMPTION OF RISK

Sporting injuries and voluntary assumption of risk

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Sporting injuries and voluntary assumption of risk[1]

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Chief Justice Gleeson observed in the High Court case of *Agar v Hyde*[2]*:*

> *"People who pursue recreational activities regarded as sports often do so in hazardous circumstances; the element of danger may add to the enjoyment of the activity. Accepting risk, sometimes to a high degree, is part of many sports."*

This paper looks at an injured person's right to sue for damages when injury occurs in a sporting context. In particular, when does the defence of "voluntary assumption of risk" answer the claim? In examining that question, we refer to a few cases that illustrate the issues as they arise in practice. The cases are not the "leading cases" that have formulated the law, they are illustrations of the law in operation in a few instances of sporting injury.

Most sports carry a significant risk of injury. Athletes pull muscles, collide, fall and break bones. Sometimes suffer cardiac arrest. Skiers – on snow or water – travel at speed in a potentially hostile environment. They fall. They collide with each other, and with natural or man-made structures. Limbs are broken. Catastrophic brain injuries occur. Sometimes the injury is fatal.

In cricket, a player hurls a rock hard ball at another person's body. There's an obvious risk of significant injury, even death.[3] In a television interview before the 1974-75 ashes test, the

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[1] Express waiver by a contractual exclusion clause is an important tool in risk management, but outside the scope of this paper.

[2] (2000) 201 CLR 552 at 561 [15]. To similar effect, see also *Rootes v Shelton* (1967) 116 CLR 383, Kitto J at 387 and *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, Callinan J at 509.

[3] When test cricketer Phil Hughes died last year when he struck on his neck by a cricket ball, he was not the first cricketer to die playing that sport, and sadly he will not be the last. Frederick, Prince of Wales, was the son of King George II and heir to the throne. He was keen on cricket. He died in 1751 from a burst abscess in his lung. The abscess was caused by a blow from a cricket ball, or maybe a real tennis ball. In either case, a sporting injury. Price Fredrick's death elevated his son, the future mad King George III, to the succession, and may have

Australian pace bowler – the legend Jeff Thomson - said he enjoyed hitting a batsman more than getting him out. He succeeded on both counts.

The injuries sustained in a sport setting range from minor to catastrophic. They include fractures, the loss of an eye and brain injuries. Topically, they may also include the effects of repeated concussion injuries, the transmission of blood borne disease, or the side effects of performance enhancing drugs.

Injuries from most sports have ended up in claims for damages before the courts. The plaintiff may be a participant or a spectator, an adult or a child, a professional[4] or an amateur.[5] The defendant may be a player or other participant, an event organiser, a manager, a coach, an umpire or referee, the occupier of premises, or a spectator. Each generally owes participants and spectators a duty to take reasonable care.[6]

To recover damages, generally an injured person must show their injury was deliberate (as in assault and battery – subject to a defence of consent), or caused by negligence - the failure of another person to take reasonable care. We will return to this point in a moment when considering the doctrine of voluntary assumption of risk.

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had a dramatic impact on world history. King George III obstinacy is credited with prolonging if not causing the American revolutionary war.

[4] The provisions of the Victorian *Wrongs Act* (1958) which reform the defence of volenti do not apply where a person is entitled to worker's compensation (s45), and in any event s54 specifically excludes from its operation proceedings "on a claim for damages in respect of risks associated with work done by one person for another": s54(2)(b). In Victoria, where there is an employer - employee relationship only the common law defence of voluntary assumption of risk can apply, and the defendant must show that the plaintiff had actual knowledge of the existence, nature and extent of the risk, and voluntarily accepted personal responsibility if it materialised.

[5] The injured person might even be a mere passer-by, as was poor Miss Stone of the celebrated case of *Boulton v Stone (*1951) AC 850. While standing outside her house, she was hit by a 6 that had been hit out of the adjacent cricket ground, but of course on those facts a question of a voluntary assumption of risk did not arise. And in any event, she lost.

[6] There have been attempts to sue bodies that regulate a sport for breach of an alleged duty to make rules to lessen the risks. Those actions have failed: *Agar v Hyde* (2000) 201 CLR 552. The law does not recognise such a duty. But we can imagine circumstances in which governing bodies might have assumed a role disseminating information and educating day to day organisers and players, and on that basis might be liable for failing to warn of risks or of ways of lessening risks. A coordinating body with detailed knowledge of the dangers of repeated concussion injuries and of ways to lessen that risk might be liable if it assumes an educating role in relation to the sport but fails to act on or pass on that knowledge.

The person who is sued will often be insured. A player, an amateur coach or a spectator may have a legal liability extension to a home contents policy. A club or an occupier of a premises may have liability cover for itself, its players, its officers and officials.

Sporting injuries are quite common. So insuring against sporting injury is potentially a profitable or an expensive business. In Victoria in 2013-14, sporting injuries accounted for about 9% of public hospital emergency department presentations for accidental injury and about 6% of all hospital admissions for accidental injury. The prevalence of sport as a source of accidental injury peaked in the age range 15-24. In that age group, sport accounted for 19% of all hospital admissions for accidental injury and was the most common cause of accidental injury leading to hospital admission, ahead of road accidents, ahead of work injuries and ahead of injuries at home. Catastrophic injury to persons in that age range is potentially among the most expensive in terms of damages.

These statistics support the conclusion you would expect. Sport carries a significant risk of injury. And it not uncommon for that risk to materialise in a significant injury. And sometimes the injured person seeks redress in the form of damages.

Defence to action in negligence - voluntary assumption of risk

It is a defence in proceedings in negligence for the defendant to prove that the plaintiff fully comprehended the risk of injury that materialised and freely chose to accept it.

The defence of "voluntary assumption of risk", which is a defence to a claim in negligence, corresponds to the plea of "consent" in actions for intended harm.[7] Both are expressions of the same philosophy of individualism: no wrong is done to one who consents: *volenti non fit injuria* - "to a willing person, injury is not done."

In 1891, in *Smith v Charles Baker & Sons* Lord Herschell said*:* [8]

> *'The maxim is founded on good sense and justice. One who has invited or assented to an act being done toward him cannot, when he suffers from it, complain of it as a wrong.'*

[7] *Fleming's Law of Torts*, 10th Ed, 2011, at [12.270].

[8] [1891] AC 325 at 360.

Conventional wisdom has it that *volenti* is a form of waiver of duty. A successful defence denies the injured person the right to sue in negligence because they are found to have agreed to take personal responsibility for the risks that materialised. It is a full defence to a claim.

At common law, to make out the defence, a defendant had to prove the injured person:

- was fully aware of the risk;
- fully appreciated its nature and extent; and
- freely and willingly accepted the risk.

Much turns on the precision with which "the risk" is identified. For example, a rugby player may be aware of and accept the risk of injury in a tackle, but not the risk of injury from a spear tackle.

The defence does not turn on the foreseeability of harm, but on the defendant establishing the plaintiff's subjective awareness and appreciation of the risk, and agreement to accept that risk in the sense of accepting that in the event of injury, the plaintiff would not look to the wrongdoer defendant for damages - which made it a difficult defence to prove.

Volenti, or voluntary assumption of risk, is a defence to an action in negligence. It arises when the conduct by which a plaintiff is injured would otherwise give rise to a liability of the defendant to pay damages for the tort of negligently causing injury. If there is no liability, there is no need to consider the defence.

Negligence is a failure to take reasonable care. Reasonable care is reasonable care in all the circumstances. Some risks can be reduced by taking reasonable care. Others - called inherent risks – are inherent in the activity. Either they cannot be lessened, or the steps that need to be taken to lessen them are not reasonable. Inherent risks are contemplated in s 55 of the *Wrongs Act* (Vic) 1958.

Wrongs Act (Vic) 1958

Part X—Negligence

55 No liability for materialisation of inherent risk

(1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.

(2) An **inherent risk** is a risk of something occurring that cannot be avoided by the exercise of reasonable care.

(3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

In *Rootes v Shelton*, Chief Justice Barwick said:

> *"By engaging in a sport or pastime the participants may be held to have accepted the risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are."*[9]

The current analysis may be that apart from a duty to warn, there is no liability on the materialisation of an inherent risk.

Inherent risks may give rise to a duty to warn, but apart from that, they are risks that exist despite taking reasonable care. Other than upon a failure to warn, if an inherent risk comes to fruition, the injury does not give rise to a liability to pay damages.

In sport, often, an awareness of a risk is an awareness of an inherent risk. And, generally, an acceptance of a risk is an acceptance of an inherent risk.

It is possible that a participant, or spectator, is aware of a risk that could be avoided by taking reasonable care, and which to that person's knowledge has not been so avoided – and none the less, the person participates (or attends as a spectator) and expressly or implicitly accepts the

[9] (1967) 116 CLR 383 at 385.

risk as his or her own – that is to say, waives rights against the wrongdoer. Absent a contractual term to that effect however, such knowledge and acceptance are rare.

The sports setting rarely offers a true analogy with the case of a passenger who knowingly accepts a ride in a car driven by a drunk driver.

Golf, however, seems to be an exception! There are cases where golfers are aware of the risk of other golfers, or course managers, acting negligently, but none the less proceeding to play despite knowing of those avoidable dangers and in circumstances in which it can be inferred the person has assumed the risk of injury to the exclusion of suit against the wrongdoer.

The barrister under whom I read as a pupil, Tom Wodak (later, Judge Wodak) told me of a jury trial in which he and Ross Gillies QC successfully ran a *volenti* defence. The plaintiff was the captain of a golf club. As captain, she knew much about the design of the club's golf course, and well knew of the danger of injury from walking across a particular fairway as a short cut. Despite that knowledge, she walked across the fairway and was hit. Her claim against the club was defeated on a defence of voluntary assumption of risk. We will refer shortly to another golf case in which a *volenti* defence succeeded - the Queensland case of *Pollard v Trude.* [10]

In other sports, particularly contact sports, a more common scenario is that a person, who might be a participant or a spectator, is aware of and accepts risks that are inherent in the sport – for example, the risk of being hit by a cricket ball, or injured by a tackle in football, provided the tackle is within the rules or not so far outside the rules as to constitute negligence or an assault.

The rules of a sport cannot exempt a defendant from taking reasonable care,[11] but may be relevant in considering what "reasonable care" is, and in considering a *volenti* defence.

The awareness goes to conduct within the rules of the game, or within an acceptable range of departure from the rules.[12] There might be an acceptance of the risk of a tackle that is against the rules, but not flagrantly so. So there is no acceptance of the risk of injury from an intentional spear tackle.

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[10] (2009) 2 Qd R 248.

[11] See, for example, *Woods v Multi-Sport Holdings* (2002) 208 CLR 460, Mc Hugh J at [79].

[12] Compare *Pallante v Stadiums Pty Ltd (No 1)* [1976] VR 331.

An infringement of the rules does not necessarily imply negligence[13], but a serious infringement amounting to dangerous foul play would. In *McCracken v Melbourne Storm Rugby League Football Club* [14] the plaintiff succeeded in an action for damages for injury sustained when he was spear tackled. The trial Judge (Hulme J) found the two Melbourne Storm players might legitimately have lifted the plaintiff's leg or legs off the ground with a view to stop his forward momentum, but not in lifting him to the height to which he was lifted. He held the lifting that occurred was far removed from what was needed to prevent forward momentum and was without justification. On appeal, Justice Ipp spoke for the Court saying that he wholly agreed, and was left in no doubt that the tackle constituted a gross infringement of the laws of the game and there was no modicum of care in the actions of the Melbourne Storm players.

So in many instances where there is a sport injury there will be no negligence and hence no liability, even where there has been an infringement – but not a gross infringement - of the rules of the game. As a result the defence of *volenti* founded on an awareness and acceptance of the risk does not arise, and in many other cases, there will be no acceptance of the risk of negligently inflicted injury because the negligent conduct is so removed from the rules as to not be "part of the game". As such, cases where there is negligence and an awareness and acceptance of the risk of injury are indeed rare.

Awareness of risk

The Ipp Report intended to make the defence of *volenti* more widely available than was the case at common law. The authors concluded that the evidentiary burden on a defendant to prove the plaintiff's subjective knowledge of the risk was too onerous.

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[13] In *Rootes v Shelton* (1967) 116 CLR 383 at 389, Kitto J said: "*Non-compliance with such rules, conventions or customs (where they exist) is necessarily one consideration to be attended to upon the question of reasonableness; but it is only one, and it may be of much or little or even no weight in the circumstances.*"

[14] [2005] NSWSC 107; and on appeal [2007] NSWCA 353.

Wrongs Act (Vic) 1958

Part X—Negligence

54 Voluntary assumption of risk

(1) If, in a proceeding on a claim for damages for negligence, a defence of voluntary assumption of risk (volenti non fit injuria) is raised and the risk of harm is an obvious risk, the person who suffered harm is presumed to have been aware of the risk, unless the person proves on the balance of probabilities that the person was not aware of the risk.

(2) Subsection (1) does not apply to—

(a) a proceeding on a claim for damages relating to the provision of or the failure to provide a professional service or health service; or

(b) a proceeding on a claim for damages in respect of risks associated with work done by one person for another.

(3) Without limiting section 47, the common law continues to apply, unaffected by subsection (1), to a proceeding referred to in subsection (2).

In response to the Report's recommendations, statutory provisions have now partly reversed the burden of proof with respect to knowledge of "an obvious risk". Where *volenti* is pleaded and the risk of harm is an obvious risk, a person who suffered harm is presumed to have been aware of the risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.

All six State jurisdictions define 'obvious risk' in very similar terms. In this paper, we refer primarily to the Victorian provision. Section 53 of the Victorian Act defines 'obvious risk' as "a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person." There are therefore both subjective and objective aspects of the test of whether a risk is obvious or not.

Wrongs Act (Vic) 1958

Part X—Negligence

53 Meaning of obvious risk

(1) For the purposes of section 54, an **obvious risk** to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in 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.

Compare

s 5F of the *Civil Liability Act* 2002 (NSW) s 5F;

s 13 of the *Civil Liability Act* 2003 (Qld);

s 36 of the *Civil Liability Act* 1936 (SA);

s 5F of the *Civil Liability Act* 2002 (WA);

s 15 of the *Civil Liability Act* 2002 (Tas)

The court must consider what a reasonable person thought was obvious, but that reasonable person is imbued with attributes of the plaintiff. The plaintiff's own knowledge and experience as to what was known subjectively and observed in the circumstances of the incident are also relevant to the assessment of what a reasonable person in that position would know about the risk.

The plaintiff's evidence (in chief and under cross examination) is therefore very significant in the consideration of whether a risk is obvious or not.

The attributes of the plaintiff need to be considered, including their:

- knowledge;
- experience of the relevant area and conditions;
- age and life experience;
- level of experience in the sport; and
- what they were capable of hearing, reading, observing and interpreting in the situation.

The consideration of the plaintiff and the 'circumstances' they were in means that the court's analysis will turn on the facts of that particular case.

The legislation therefore applies both to plaintiffs who subjectively knew of the risk, and also plaintiffs who are deemed to know of the risk because of the reasonable person test.

In order to prove awareness of the risk:

- Defendants have the burden of persuading the court that the risk was 'obvious'.
- Once that burden has been discharged, the statutory presumption arises that the plaintiff was aware of the risk of harm.
- To displace the presumption, plaintiffs must prove on the balance of probabilities that they were not aware of the risk.

A risk that was not "obvious" at the outset of a plaintiff's activity can become "obvious" from experience gained while undertaking the activity and before the injury occurs. So, for example in a case heard in the NSW District Court [15] the plaintiff, an inexperienced rider, fell from a horse, on the course of a trail ride, due to the saddle slipping. The Judge held the risk of falling from the horse was "obvious" but the risk of falling from the horse because of the saddle slipping was not. However, the Judge also found that because in the course of the ride prior to the fall the plaintiff discerned that the saddle had slipped, and dismounted and then

[15] *Mikronis v Adams* (2004) 1 DCLR (NSW) 369.

remounted without adjusting the saddle or drawing the difficulty to the attention of anyone, she had gained knowledge of what thereby became an obvious risk prior to the fall.[16]

In the Queensland case of *Pollard v Trude*[17] the plaintiff and defendant were proficient amateur golfers playing in a club competition. The plaintiff struck his shot and the ball went into the trees on the edge of the fairway. In accordance with the rules and practice, he located his ball, avoiding penalty and enabling the round to be played quickly for the benefit of the following golfers. The plaintiff found his ball and waited for the defendant to take his next shot. When the defendant struck his golf ball, it hit a branch at the edge of the fairway and ricocheted into the plaintiff, who was standing among the trees. As a result the plaintiff lost sight in one of his eyes.

The plaintiff gave evidence that he expected the defendant to hit the ball while he was ahead on the course locating his ball, but the plaintiff expected to be warned of the defendant's shot being taken.

Justice Chesterman found against the plaintiff on a number of grounds including on the question of whether in the circumstances, the risk would have been obvious to a reasonable person in the position of that person.

In finding that the risk was obvious, the Judge referred to both subjective and objective elements of the factual scenario. He also referred the section equivalent to s 53(3) of the *Wrongs Act* which states that a risk of something occurring can be an obvious risk even though it has a low probability of occurring -

> *"The risk that Dr Pollard might be struck by Mr Trude's ball was in the circumstances I have described a small one. It had, in the words of the subsection, a low probability of occurring. The plaintiff was protected by the trees, the defendant was a good golfer who was hitting in a line away from the plaintiff.*
>
> *The risk was, nevertheless, obvious. To the extent that evidence was necessary it established that even the best golfers can hit wayward shots and a ball which hits a tree can deflect in any direction. To go in front of a golfer about to hit a shot is to run an obvious risk, the magnitude of which will vary with the skill of the golfer, the*

[16] Ibid, referred to in *Civil Liability Australia* at [15,065].

[17] [2008] QSC 119, affirmed on appeal (2008) 2 Qd R 248.

distance in front and the size of the angle between the line from the golfer to that person and the line of the intended shot. Dr Pollard's evidence that he expected a warning from Mr Trude is a tacit acceptance of the existence of the risk." [18]

In Western Australia, South Australia, New South Wales, Tasmania and Queensland, statute now provides that a person is relevantly aware of a risk if they are aware of the 'type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.'[19] For the injured person to prove that they were not aware, they need therefore prove on the balance of probabilities that they were not even aware of the type or kind of risk that eventuated.[20]

There is no comparable provision in the Victorian legislation, so where the case is governed by Victorian law a plaintiff needs to prove, on the balance of probabilities, they were not aware of the particular risk that caused the harm, being the common law test for awareness, making it a slightly easier hurdle for the plaintiff to traverse to defeat the defence.

In the Tasmanian case of *Dodge v Snell* [21] the plaintiff and defendant were jockeys in a horse race. The defendant was on the outside position, and passed 2 horses. The defendant had 5 horses to his inside with 3 at the front and 2 following closely behind. To reach the rail and maintain his forward position, the defendant had to cross in front of the 3 horses in the lead.

The horses were bunched together near the barrier, and the defendant's movement caused the plaintiff's horse to stumble and fall. The horse landed on the plaintiff, and he sustained a fractured C6, displaced collarbone, fractured ribs and extensive soft injuries which were life threatening. The fall ended the plaintiff's career as a professional jockey.

The plaintiff's case was that the defendant rode his horse in towards the rail when he was insufficiently clear of the horses to his inside, breaching the 'two lengths policy'. This was the rule that other jockeys were not permitted to shift ground inwards or outwards unless they

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[18] *Pollard v Trude* [2008] QSC 119 at [65]. Had this proceeding taken place in Victoria, the burden of proof would have then shifted to the plaintiff to prove that on the balance of probabilities, the plaintiff was not aware of the risk or information (s 56 *Wrongs Act* 1958 (Vic).

[19] *Civil Liability Act 2002* (WA); *Civil Liability Act 1936* (SA), 37(2); *Civil Liability Act 2002* (NSW), ss 5N(2), 5G(2); *Civil Liability Act 2002* (Tas), s 16(2); *Civil Liability Act 2003* (Qld), s 14(2).

[20] *Dodge v Snell* [2011] TASSC 19 at [223].

[21] [2011] TASC 19.

were sufficiently clear of other horses so as not to cause interference with other horses and their 'rightful running'. The policy was developed to assist riders so that they know when they can shift ground without causing interference to horses following them in the field.

It was argued that by breaching the policy the defendant should have known that he was exposing other horses and riders to a risk of injury. The defendant argued that the plaintiff had knowledge and full appreciation as to the dangerous nature of being a professional jockey participating in a horse race, and that the plaintiff voluntarily accepted the risks associated with riding in the race.

Justice Wood considered whether the risk was obvious to a reasonable person in the plaintiff's position, taking into account the plaintiff's:

- experience as a professional jockey;
- level of competency and age;
- knowledge of the track where the race was held;
- familiarity with the two lengths policy; and
- awareness of the frequency with which the two lengths policy is breached, including falls and injuries in the case of more extreme breaches.

The Judge found that a jockey in the plaintiff's position would be aware of the realities of racing, the race imperative driving each jockey to try to win and the practical advantage of reaching the rail. It was found that the risk was obvious to a reasonable person in the plaintiff's position.

The plaintiff was therefore taken to be aware of the existence of the risk. In Tasmania, to displace the statutory presumption that he was aware of the risk, the plaintiff was required to show that he was not even aware of the existence of the type or kind of risk that eventuated. The plaintiff did not establish this on the evidence, and so the first two elements of *volenti* were established.

The *volenti* defence failed on the third element of voluntary acceptance of risk in this case. Justice Wood held, "There was nothing that the plaintiff could do to avoid or reduce the risk if he was to work as a successful jockey". [22]

It is to that third element, the voluntary acceptance of the risk, that we now turn.

Acceptance of risk

To establish a defence of *volenti* a defendant must prove on the balance of probabilities that the plaintiff was not only aware of the danger, but also that he or she voluntarily agreed to accept that risk. This acceptance can come in the form of an implicit agreement to incur the risk and to waive any claims he or she may have against the defendant. Express waivers by contractual exclusion clauses are very important tools in risk management, but outside the scope of this paper.[23]

In a *volenti* defence, as opposed to a contractual exclusion clause, the evidence will usually be inferential. It must establish that the plaintiff, knowing of the risk, accepted that if the risk came to pass, he or she would wear the loss, without recourse to the negligent defendant.

A person is not taken to have voluntarily assumed the risk of negligence on the part of another merely by engaging in a sport or pastime even if the activity carries an inherent danger.[24]

The plaintiff's acceptance of a risk was analysed in the New South Wales Court of Appeal decision of *Canterbury Municipal Council v Taylor.*[25] Canterbury Council ran a sport complex in which a cycle track bordered a playing field. The plaintiff was warming up on the cycle track while touch football players were concluding their match on the playing field. A touch

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[22] At [237].

[23] Sporting businesses often rely on exclusion clauses, whether signed by the participant or adopted into a "ticket" from a sign. The issues that may arise include questions concerning the incorporation of displayed terms as contractual terms (*Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, Brennan J at 228-9; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [50]-[55]) and whether the term is excluded by operation of s64 of the *Australian Consumer Law*, or saved by operation of s139A of the *Competition and Consumer Act* 2010 (Cth) and related State laws such as s22 of the *Australian Consumer Law and Fair Trading Act* 2012 (Vic). See *Alameddine v Glenworth Valley Horse Riding Pty Ltd* [2015] NSWCA 219. Compare the provisions under the former *Trade Practices Act* – see for example *Motorcycle Inc Events Group Australia Pty Ltd v Kelly* (2013) 86 NSWLR 55; *Perisher Blue Pty Ltd v Nair-Smith* (2015) 320 ALR 325.

[24] See, for example, *Rootes v Shelton* (1967) 116 CLR 383.

[25] [2002] NSWCA 24.

footballer stepped back onto the track and the plaintiff collided with him. The touch football player was killed, and the plaintiff suffered physical and psychological injuries. He sued the Council and established negligence in the management of the dual use facility. The Council pleaded *volenti* as one of its defences. It was found the cyclist knew of, and appreciated the risk of dual use, namely that one of the touch players might carelessly walk into his path. But despite this awareness of the risk, the defence of *volenti* was rejected at first instance and on appeal. Justice of Appeal Ipp said:

> *"The issue is not whether the plaintiff voluntarily and rashly exposed himself to the risk of injury, but whether he agreed that if injury befell him the loss should be on him and not on the defendant".*

Although the plaintiff appreciated the risk, it could not be said that merely by participating in the warm-up voluntarily he assumed the risk of injury. The trial judge found that he had not agreed that, if injury befell him, the loss should be on him and not on any other negligent party, and the Court of Appeal held that finding open to the trial judge. Knowledge of the risk alone is insufficient. Justice Ipp reasoned that it does not follow merely from the fact that someone appreciates or should appreciate the dangers of simultaneous dual use that he believed that the touch football players would carelessly walk into the cyclists' path. He may well have believed that the footballers would act responsibly and so the danger would not materialise. That belief would negative the inference that he accepted the risk of the dangers. So the defence of *volenti* was not made out. Instead, there was a finding of 25% contributory negligence against the plaintiff.

In another cycling case, *Carey v Lake Macquarie City Council*, [26] Chief Judge in Common law in New South Wales, Justice McClellan, was a member of the Court of Appeal that considered another case brought by a cyclist against a municipal council. The cyclist, Carey, was injured when at night he collided with a bollard erected upon a pathway in a public path maintained by the defendant municipal council. He was aware there were bollards on paths in the park as he had passed some earlier that day in daylight hours. He gave evidence, which was accepted, that when he turned down the relevant path, just before the accident occurred, he gave no immediate consideration to the fact that there was a bollard along that path.

Justice McClellan noted that although someone may have been aware of the bollard in the pathway, proof of knowledge of a risk is not of itself sufficient to make out the defence of

[26] [2007] NSWCA 4.

volenti non fit injuria. A defendant must prove that the plaintiff voluntarily assumed the risk, not merely that he knew about it. Although the plaintiff was aware of the risk, his evidence, which was accepted, was that he did not think about it when he turned down the path.

The Judge noted "there may be cases where a court can infer that a plaintiff has voluntarily assumed a risk from the fact that the plaintiff has exposed themselves to a risk of which they were aware." However, the inference is not available merely because a plaintiff knows of the risk when engaged in the relevant conduct. Drawing the inference is a question of fact that must be considered on a case by case basis. Even though the plaintiff was aware of the risk, he said and the trial judge accepted, that he did not advert to that known risk when he turned down the path. The Judge found that this evidence was inconsistent with the inference that the plaintiff had voluntarily assumed the risk that he might hit unexpected obstacles.

In short, a person can be aware of a risk, even an obvious risk, without adverting to it when they expose themselves to the risk, and in such a case there is no acceptance of the risk and so the defence of *volenti* is not made out. A partial defence of contributory negligence, however, may well succeed.

To establish a prima facie liability in the context of sport, there must be negligence on the part of someone else. In an appropriate case, a defence of voluntary assumption of risk can defeat that liability, but such cases are truly very rare.