



# Skydiver Goes Down in Victorian Supreme Court

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In unfortunate circumstances, Hayley Marks (the Plaintiff) was significantly injured when she landed hard on the ground during a tandem skydiving jump. The Plaintiff had booked the skydiving tour as a surprise for her partner's 30th birthday. Though her partner jumped and landed without incident, the Plaintiff did not.

The Plaintiff alleged that the skydiving company had been negligent on several grounds, though the primary allegation was that the tandem instructor had failed to adequately control the landing given the weather conditions.

As is common in these types of cases, the defendant skydiving company raised a waiver that they said the Plaintiff had agreed to. Critically, the trial judge found that the waiver was adequate insofar as it effectively conveyed the risk involved in skydiving (including the potential for there to be adverse weather conditions) to the Plaintiff, however, it could not be relied on by the Defendant as it had not been adequately drawn to the Plaintiff's

attention prior to her jump.

The court very carefully considered how the contract had been formed between the Plaintiff and the Defendant. The decision again reiterated the importance of being able to demonstrate clearly when a waiver was presented, how it was presented and proof that a participant read it, fully understood it and agreed to its terms. Here, the Court said that there was not enough done in that regard. The court concluded the waiver should have been presented to the Plaintiff and her partner to sign in person before they commenced the skydiving activity, rather than relying on participants agreeing to the terms of the waiver in online bookings.

In terms of the actual cause of the injury, the court rejected the Plaintiff's argument that the instructor had failed to adequately manage the landing and accepted the Defendant's contention that the heavy landing was something that was unable to be avoided as it was the result of a downdraft (turbulence) that it could not control or take any reasonable measures to prevent or foresee. In reaching that decision, the Court heard expert evidence from a meteorologist as well as a number of skydiving instructors (including the instructors who were involved), all of which carefully scrutinised the final approach before the Plaintiff's heavy landing. The trial judge concluded that the Plaintiff's injuries were not caused by any failure of the skydiving instructor or the skydiving company itself to exercise reasonable care as what occurred was "an unfortunate random event". It followed then that the claims in contract and under the Australia Consumer Law failed as well.

As the Court concluded that the skydiving company was not liable, it did not have to deal substantively with section 55 of the Wrongs Act 1958 (Vic), which provides a defence for harm suffered as a result of the materialisation of inherent risk. The trial judge accepted that the adverse weather conditions (specifically turbulence) were an inherent risk associated with skydiving (inherent risk defined in section 55 as "a risk of something occurring that cannot be avoided by the exercise of reasonable care"). That finding was in harmony with the conclusion that the Defendant was not liable for the unfortunate incident.

## IMPLICATIONS

This case again highlights that each decision concerning dangerous recreational activity events is very fact-specific. In this decision, there was a wealth of evidence from eyewitnesses as well as experts about exactly what occurred. Although the conclusion was that the skydiving company was not liable, the comments that the defence of inherent risk applied again demonstrate that those types of defences will usually only

apply if a defendant is able to demonstrate that there was no breach of duty, or such a breach was not a cause of the harm suffered.

As the decision turned nearly entirely on the evidence available at trial, we consider that an appeal is probably unlikely as it will be difficult for the Plaintiff to argue that the findings based upon the witness evidence were not available to the trial judge.

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