

MOOTING MANUAL

Prepared by Murdoch University's Moot Court Bench

1. Introduction

1.1 What is mooting?

Mooting is essentially a practice court proceeding. Mooters are presented with a fictional fact scenario and asked to present a case for a client. Mooting takes a number of different forms; it may be a simulation of the High Court, Supreme Court, an arbitration, or some other tribunal. The rules, custom and procedure may vary, but of foremost importance is excellence in advocacy skills.

1.2 Benefits of mooting

Mooting improves research skills and deepens knowledge on a specific area of law, but most importantly, mooting develops advocacy skills. Advocacy is an exercise in the art of persuasion. A strong advocate is not one who deceives decision makers, but presents the best case for one point of view.

2. Before the Moot

2.1 Know the rules

Different moots will have different rules and expectations. A prudent first step is to know the competition you're competing in.

Read the competition rules and pay special attention to the deadlines that will apply - even if competition organisers do not strictly follow them, it is disrespectful to fellow competitors, judges and organisers to ignore them. Consult the marking key if possible - there is no stronger indicator of what the judge is looking for.

2.2 The question

Moot questions are often complex, involving a long account of the facts. Don't let this scare you. The job of the mooter is to provide clarity where everything has gone awry.

Sometimes the question can be more easily understood by drawing up a chronology of events. Charts and organisational diagrams will assist in simplifying a question before any research takes place.

Read your instructions carefully. You will often only be asked to address one of the grounds in the action. Many competitions allow legislation only to be referred to where it is contained in the question itself. Often questions will specify which legislation applies.

Jurisdiction is also important. Know where the jurisdiction rests, and think about the implications. Jurisdiction affects not only the persuasiveness of courts, but the legislation that informs the bench. The High Court often must consider a given state's unique legislation when exercising its appellate jurisdiction.

2.3 Research

Regardless of whether you think you have the easier side to argue the most important thing in a moot is to be familiar with the relevant law, so *be thorough*. Read the question carefully and know the facts inside out. Again, be clear about exactly what ground you are being asked to address and focus your research on this area of law.

Understand where the facts are vague or in contention. If the facts are not 100% clear on a point, then you (or your opponent) will have some room to work in your own favourable interpretation.

Look at any sections of statutes or cases referred to in the question and read through them as well. Textbooks and commentary are helpful to give you an overall view of the state of the law. Cases will form the basis of your argument and are an excellent source of legal authority. For each relevant case be familiar with the jurisdiction, the facts, the decision of the majority and any dissenting judgements.

Analogy is a great tool in any argument, so pay special attention to cases with similar facts and think about how to apply them to your argument.

A common mistake for first time mooters is to overlook the weaknesses in their argument. Think about the question from the point of view of your opponent and be familiar with the cases and the law they are likely to discuss.

Summary of Research Steps for Torts Question

2.4 Start with information given in the question

2.4.1 Is there any legislation mentioned?

Look at applicable sections of legislation, and case law which judicially considered those sections.

*FirstPoint: Legislation Judicially Considered (see 2.6.2);

*Lexis Nexus Casebase: References to Legislation (2.7.1);

*Annotated guides to the Legislation

NOTE: most mooting competition rules exclude reference to legislation not mentioned in the question.

2.4.2 Are there any cases mentioned?

Become familiar with the case(s) and the legal principles. Enter the case into Case base - cases that affirm the decision are generally helpful if you are the respondent in an appeal case. Cases that disapprove or distinguish will generally be helpful if you want to distinguish the case from your case (see 2.7.1)

2.5 Textbooks - Never underestimate the value of a good textbook! Textbooks are great to gain a general understanding of the particular issue; they outline the main legal principles, highlight contentious areas and set out leading cases in each area.

2.6 Legal Commentary

2.6.1 Halsbury's Laws of Australia Online

[<http://www.lib.murdoch.edu.au/> → click on Databases (from the list on the left-hand side) → Browse By Subject; Law → LexisNexis (if you are accessing from home you will need to enter your student number and password) → accept the terms and conditions → **click on commentary** (red tab near the top of the screen) → Sources: select Halsbury's Laws of Australia (from the drop down list) → enter your search terms]

2.6.2 Laws of Australia [FirstPoint]

[<http://www.lib.murdoch.edu.au/> → click on Databases (from the list on the left-hand side) → Browse By Subject; Law → Law Book Online → click on The Laws of Australia (new version) (Under the Research Heading) → You can then, for example, browse the Torts Heading (No. 33 on the list on the left hand side) or use any of the search functions.

2.7 Legal Search Engines -

2.7.1 LexisNexis

Case base

<http://wwwlib.murdoch.edu.au/> → click on Databases (from the list on the left-hand side) → Browse By Subject; Law → LexisNexis (if you are accessing from home you will need to enter your student number and password) → accept the terms and conditions → **click on Cases** (red tab near the top) → you can do a variety of searches; if you have the citation use it as it will be the most accurate.

Dictionaries

<http://wwwlib.murdoch.edu.au/> → click on Databases (from the list on the left-hand side) → Browse By Subject; Law → Lexis Nexis (if you are accessing from home you will need to enter your student number and password) → accept the terms and conditions → **click on Dictionaries** (red tab near the top) → enter you search terms.

2.7.2 FirstPoint

<http://wwwlib.murdoch.edu.au/> → click on Databases (from the list on the left-hand side) → Browse By Subject; Law → Law Book Online → click on First Point → conduct free text search or more specific searches such as “legislation judicially considered”]

NOTE: Cases on FirstPoint are authorized versions and in PDF format.

2.7.3 CCH Online

<http://wwwlib.murdoch.edu.au/> → click on Databases (from the list on the left-hand side) → Browse By Subject; Law → CCH Online → Australian Torts Reporter (under the individual titles heading) → you can then navigate your way around. We would recommend the Torts Commentary Link and also Torts Legislation Link]

2.8 Search Terms

If you are not familiar with standard search terms or connectors spend a few moments to look at a fact sheet, most search engines will have a list of connectors.

E.g.: Lexis: Connectors Help - Link under search on any of their databases

Spending a few minutes doing this will make you searching more efficient!

2.9 Time Management

Know your deadlines. Ensure that you leave enough time to compose your written submissions, photocopy cases, consider your opponents submissions, eat a good dinner and RELAX for a period before your oral submissions.

3. Written Submissions

What is a written submission?

A written submission is a document the mooter presents to the court outlining the key elements of the mooter's argument. It identifies the precedents and legislation the mooter will rely on in oral argument.

The written submission *is not* a complete account of everything the mooter will say to the court. It is a brief outline of the main points that the judges can follow during your presentation. You should also be aware that you will generally be required to present your written submissions in advance of the moot, usually in the morning of the day the moot takes place.

Elements of the written submission

3.1 The Header

The header sets out the title of the matter before the court. The Header will state:

1. the Court the matter is heard in; and
2. the number of the matter and the year; and
3. the names of the parties involved in the matter; and
4. which party is making the submission; and
5. the name of the counsel making the submission.

It should look something like this-

IN THE SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

No 102 of 2007

BETWEEN

FRENCHIE'S SALON

Appellant

and

HAIR APPARENT

Respondent

RESPONDENT'S SUBMISSIONS (Senior Counsel – John Doe)

Senior Counsel's submission needs to include a basic summary of the facts. This should be a few basic statements of the relevant facts from the scenario, and should provide the bare outline of what the court needs to know. Be careful to state the facts in an unbiased manner, preferably quoting parts of the facts from the question directly. For example-

(A) SUMMARY OF THE FACTS

1. The appellant enquired to purchase 3 new hair washing machines from the respondent. These chairs were the 'Relax and Clean 5000'.
2. The appellant and respondent entered into a standard form contract for the sale of the chairs.
3. Clause e. provided that payment be paid at the time of installation and clause f. stated that in the event of the chairs failing to or being defective in any way they shall be rectified accordingly.
4. After installation it was discovered two of the chairs did not work properly. The massage did not work on one and the hot water did not work properly on another. The appellant further complained that the chairs were not comfortable.
5. The appellant demanded a full refund for all three chairs and did not pay the balance of the purchase price.
6. At first instance the appellant's case was dismissed and is now appealed to the Supreme Court of the Australian Capital Territory.

3.3 Submissions

Your submissions are the skeleton of your argument. Break your argument down into main points and present each one as succinctly and effectively as possible. The three essential elements of a submission are-

- a statement of the law, including the authority it relies on,
- a brief explanation of why it applies to the particular facts; and
- the conclusion you are leading the court to draw.

This is an example of how one of your submissions might look-

1. The Respondent did not Voluntarily Assume Risk as he did not know of the Circumstances Creating the Risk.

1.1 The defence of Voluntary Assumption of Risk requires that the Respondent knew about the circumstances creating the risk - *Insurance Commissioner v Joyce* (1948) 77 CLR 39, 47 (Latham CJ).

1.2 The Respondent checked before catching the wave and did not see an obstruction. Also he believed he was a distance from the pipes. The Respondent did not know of the circumstances creating the risk.

Ideally your argument will rest on three separate submissions, but you may have more or less depending on the facts you are given and your time allocation.

3.4 Conclusion and sign-off

After the submissions add a sentence telling the court what outcome you wish to achieve. Add the date and sign off.

On the basis of the above submissions, counsel for the Respondent respectfully requests an Order of the Court upholding the appeal and reversing the order of the trial judge.

DATED this 3rd day of **July 2007**

JOHN DOE
Senior Counsel for the Appellant

3.5 List of Authorities

The last page of the submission will be your list of authorities. Start with the header (see 3.1) and give the full citation of the cases and legislation you are referring to in alphabetical order, like this-

IN THE SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

No 102 of 2007

BETWEEN

HAIR APARENT

Appellant

and

FRENCHIE'S SALON

Respondent

RESPONDENT'S LIST OF AUTHORITIES

Legislation

1. *Limitation Act 1935* (WA)

Cases

1. *Cigna Insurance Asia Pacific Ltd v Packer* (2000) 23 WAR 169
2. *Hawkins v Clayton* (1998) 164 CLR 539
3. *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (A Firm)* [1979] Ch 384
4. *Sheldon v McBeath* [1993] Aust Torts Reports 81-209 (NSWCA)
5. *Shaw v Shaw* [1954] 2 QB 429

4. At the Moot - Etiquette and formalities

The courtroom is a very formal environment. Since mooting is essentially a simulation of a courtroom the same level of formality applies. Dress conservatively, probably more so than you would usually dress. Wear a dark suit if possible, with a collared shirt.

Hair should look neat - if you have long hair it is best to tie it back away from your face. Any jewellery worn should be minimal. Ties should not be too busy. Footwear should generally be enclosed.

The following are general rules of etiquette observed during moots.

- You should aim to arrive at the designated meeting spot at least 10 minutes before the specified time.
- Be courteous to your fellow competitors as well as the judge and judge's associate.
- When addressing the court, you should remain behind the desk.
- When you are not addressing the court, you must remain seated in your place at the counsel table.
- You should not indicate your opinion of what is being submitted (or the decision of the Bench) by using facial gestures or other non-verbal displays.
- Do not speak with your partner while the other side is presenting.
- Avoid excessive gestures and movement while presenting your submissions. Some gesturing is good to emphasise your points, but don't overdo it.
- Avoid condescending comments and theatrical presentation. Never speak over a judge or arbitrator. Always wait for the judge or arbitrator to finish his or her sentence before responding.
- No two counsel should be standing at the same time.
- No food, drink or tobacco should be consumed while the Court is in session (including lollies and chewing gum). Please note that the judge's associate usually provides water for competitors.

4.1 What to bring

You should prepare all your supporting materials in advance of the moot. These include-

- unmarked copies of the cases and sections of the legislation you will refer to. These will be handed to the judge before the moot commences.
- highlighted or annotated copies of the same documents for yourself.
- a copy of your written submission for yourself.
- any notes you will need for your oral presentation.

If your question relies heavily on a particular piece of legislation it may be prudent to bring a copy of the full act if possible. This will be handy if you've made any oversights and the judge asks you a question about a specific section.

4.2 Seating

Measured from the viewpoint of the judge the convention is that the plaintiff or appellant sits on the judge's left while the defendant or respondent sits to the judge's right. If you are at all unsure the best procedure is to ask the judge's associate or court official.

4.3 Language

Again the language used during a moot is highly formal in order to simulate a legal environment. You should only ever address the Judge, never opposing counsel or your own side. Refer to the Judge as "Your Honour". A mooter will usually use the title frequently, particularly in beginning a statement to the court, or replying to interjections from the bench.

During argument, High Court and Supreme Court Justices are referred to as "Justice (name)" and District Court judges are referred to as "Judge (name)".

If you are referring to an argument made by someone from your side, use the term "my colleague" or "my learned colleague". Refer to opposing counsel using the terms "my friend" or "my learned friend".

4.4 Procedure

The moot will start with the Judge entering the court. The judge's associate will announce the judge is about to enter. Everyone should stand. The judge

walks in and takes their seat. The judge will then indicate that you should sit. Do not sit until the judge says you may sit. It is better to still be standing than to sit down too early.

The Judge will then ask for appearances. Appearances are simply where the mooters introduce themselves and state who they are acting for.

The senior counsel for the appellant appears first. They stand up and say something like:

“If it pleases the court my name is Marie Jones and I appear with my learned junior Alex Smith for the appellant Baltic Shipping.”

Then Appellant counsel may sit.

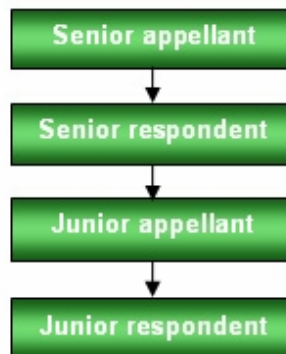
The counsel for the respondent goes next. The senior counsel stands up and will say something like:

“If it pleases the court my name is Tim Jones and I appear with my learned junior Jessica Smith for the respondent Dillon.”

The Respondent's counsel may sit.

4.5 Speaking order

After appearances, the mooters will be asked in the appropriate order to present their oral submissions. Although it changes with different moots, speakers usually appear in the following order:



5. Oral presentation- structure

5.1 Introduction

The oral presentation is the exciting part of the moot, and is your chance to convince the Judge of the strengths of your case. Start with a brief statement

that is catchy, concise and reflects the central idea of your argument. This is your case theory, ie, a statement that draws the courts attention to what the case is about from your clients' position.

For example-

“Your Honour, without telling my client, this Doctor had another, less skillful surgeon perform surgery that ruined my client’s chance of a lucrative media career.”

Or, on the other side of the argument –

“Your Honour, Dr Dare advised Ms Le Nez of the risk of surgical complications and in so doing he fulfilled both his proactive and his reactive duty to take reasonable care in the treatment of his patient.”

Also, you can use your introduction to put the issues in a broader context. Discussing policy issues is a good way to give your introduction a hint of drama that may make your argument more effective.

For example-

“Effective management of our health system requires that public hospitals be able to allocate and delegate treatment according to staff availability.”

Finish up your introduction by briefly outlining what each of your submissions will be.

5.2 The First Speaker

The first speaker has a slightly different role to the other speakers. The first speaker often has the task of presenting the facts to the Judge. Before continuing with their first submission, the speaker would usually say:

“Before I proceed with my submissions would Your Honour like a brief summary of the facts?”

The facts are agreed upon by both parties and should be presented in a simple and unbiased manner.

Often, the first speaker will also need to determine if the court prefers informal citations. They will usually give the full citation of the first case they refer to, then say something like-

“I ask that we dispense with full case citations.”

5.3 Submissions

Introduce each submission by saying something like-

“I will now move on to my first submission”.

Each individual submission should commence with a pithy sentence explaining the submission in a nutshell. When you've finished each individual submission try summarising in an equally pithy way before moving on to the next submission.

Proceed through your submissions in the same order as they appear in your written submission. Also, refer to your written submissions as you go along, since it is critical that the bench is keeping up with you.

It may even be prudent to finish each submission with-

“If there are no questions Your Honour I shall proceed to my next submission.”

5.4 Interjections

It is standard practice for the judge to interject with questions during the presentation of your submissions. This is where your thorough preparation in the research stage pays off.

Mooting competition nearly always comes down to which member best handles questioning from the panel. A mooter must be able to suspend the presentation of their argument to answer questions directly and simply.

A simple and direct answer is always the best. A judge will ask a question to seek clarity or to gauge your grasp on the law - a simple answer will satisfy a judge in both instances. Likewise a direct answer is always best.

It is useful to recognise that sometimes judges ask questions that require a simple 'yes' or 'no' response. In such cases, answer 'yes' or 'no' and only elaborate if this is needed. Sometimes you will not be able to answer a judge's question to their satisfaction. If this is the case you must find a way to return to your submission or progress to your next one. Sometimes you may need to say something like “I am unable to assist the court further on this point...”

Do not be afraid to disagree with the judge so long as you can justify your reasons, but never be argumentative or dismissive. Also, never speak over the judge.

The judge may also interject to ask for more specific references or clarification of the facts. Be prepared to provide page and paragraph numbers, don't state principles in law without being ready to state sources.

5.5 Closing

A good closing should sum up what has been said, highlighting the essential issues and how they should be resolved. Refer to your strongest arguments without stating them in excessive detail. Also, make reference to the points or policy or case theory you mentioned in the introduction as a way of tying everything together.

Some mooters will memorise two conclusions to their argument- one long one that covers all the issues and a shorter punchier one in case they run out of time.

6. Oral Presentation- General Pointers

The ultimate goal of any mooter is to convince the court that their interpretation of the law is the most desirable. As such your success in mooting will depend as much on your ability to persuade as it does on your ability to read the law. Here are some general pointers to think about when preparing your oral presentation.

Be prepared- This point cannot be stressed enough! If you know the material inside out you will be able to deliver it more naturally.

Be confident- The more certain you are that what you're saying is correct the more convincing you will be. A confident speaker will-

- stand up straight
- face the bench directly
- speak clearly at a slow, natural pace
- maintain eye contact with the bench

Avoid reading from notes- Many first time mooters make the mistake of writing out their oral presentation verbatim and reading it out to the court. If you read, you will more likely be monotonic, you may speak too fast, you will be unable to maintain eye contact with the bench and you may lose your place if the judge interjects with a question.

A better strategy is to trust yourself to recall what's important. Make an outline of general points with bold headings that you can refer to if you have trouble.

It will be much easier if you practice your oral presentation as many times as you can before the moot- it will vastly improve every time.

Have fun! Mooting for the first time can be nerve racking but the experience is priceless, and the more mooting you do the better you will become.

Appendix 1- Example Written submission

IN THE SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

No 102 of

2007

BETWEEN

FRENCHIE'S SALON

Appellant

and

HAIR APPARENT

Respondent

RESPONDENT'S OUTLINE OF SUBMISSIONS

SUMMARY OF THE FACTS

1. The appellant enquired to purchase 3 new hair washing machines from the respondent. These chairs were the 'Relax and Clean 5000'.
2. The appellant and respondent entered into a standard form contract for the sale of the chairs.
3. Clause e. provided that payment be paid at the time of installation and clause f. stated that in the event of the chairs failing to or being defective in any way they shall be rectified accordingly.
4. After installation it was discovered two of the chairs did not work properly. The massage did not work on one and the hot water did not work properly on another. The appellant further complained that the chairs were not comfortable.
5. The appellant demanded a full refund for all three chairs and did not pay the balance of the purchase price.
6. At first instance the appellant's case was dismissed and is now appealed to the Supreme Court of the Australian Capital Territory.

SUBMISSION ONE

- 1.1 There is a presumption that stipulations as to time of payment are not deemed to be of the essence of a contract of sale, subject to the terms of the contract.

Trans Trust SPRL v Danubian Trading Co Ltd [1952] 2 QB 297 at 305 per Denning LJ.

1.2 In this instance, the terms of the contract evinced the intention of the parties that payment at the time of installation was an essential condition.

1.2.1 The strong language of clause specifically, 'shall be' and 'forthwith', indicated that payment at the time of installation was an express condition of the contract.

Trans Trust SPRL v Danubian Trading Co Ltd [1952] 2 QB 297 at 305 per Denning LJ.

Portaria Shipping Co v Gulf Pacific Navigation Co Ltd (The Selene G) [1981] 2 Lloyd's Rep 180 at 185 per Robert Goff J.

1.2.2 Since the respondent is a supplier for products of hair salons it wishes to be assured in advance that they will receive payment at the time of installation.

Trans Trust SPRL v Danubian Trading Co Ltd [1952] 2 QB 297 at 305 per Denning LJ.

SUBMISSION TWO

2.1 The Parol Evidence Rule states that a contract in writing is presumed to be a complete statement of the agreement between the parties.

Mercantile Bank of Sydney v Taylor (1891) 12 LR (NSW) 252 at 262 per Innes J.

2.2 In this instance, only the written standard form contract was indicative of the agreement between the respondent and the appellant.

2.3 There are certain terms that may be implied into the contract, irrespective of the intention of the parties.

2.4 The implication of terms in fact *ad hoc* into a written agreement must meet the five requirements laid down in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266:

2.4.1 It must be reasonable and equitable.

2.4.2 It must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it.

2.4.3 It must be so obvious that it goes without saying.

2.4.4 It must be capable of clear expression.

2.4.5 It must not contradict any express term.

BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) CLR 266 at 283 per Lord Simon of Glaisdale.

Codelfa v Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337 at 347, per Mason J.

2.5 An implied term requiring that the chairs had to be functioning correctly at the time of installation does not meet all these requirements.

2.5.1 The implied term does not operate reasonably and equitably between the parties as the respondent was obliged to repair all defects.

2.5.2 The implied term is not necessary to make the contract effective in a business sense as the contract is commercially effective without the term since the respondent was obliged to repair all defects.

Bell v Lever Bros Ltd [1932] AC 161 at 226 per Lord Atkin.
Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41 at 66 per Gibbs CJ

2.5.3 The implied term contradicts the express terms in the written agreement.

On the basis of the above submissions, counsel for the Respondent respectfully requests an Order of the Court upholding the appeal and reversing the order of the trial judge.

DATED this 3rd day of **July 2007**

JOHN DOE
Senior Counsel for the Appellant

IN THE SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

No 102 of

2007

BETWEEN

HAIR APARENT

Appellant

and

FRENCHIE'S SALON

Respondent

RESPONDENT'S LIST OF AUTHORITIES

1. *Bell v Lever Bros Ltd* [1932] AC 161.
2. *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) CLR 266.
3. *Codelfa v Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337.
4. *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41.
5. *Mercantile Bank of Sydney v Taylor* (1891) 12 LR (NSW) 252.
6. *Portaria Shipping Co v Gulf Pacific Navigation Co Ltd (The Selene G)* [1981] 2 Lloyd's Rep 180.
7. *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297.

Appendix 2 - Example written submissions

IN THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL

No. CA 84 of 2006

BETWEEN:

MANLY COUNCIL AND SYDNEY WATER CORPORATION

Appellant

and

BENNETT

Respondent

RESPONDENT'S SUBMISSIONS

(Junior Counsel, Alex Ardvard)

1. The Appellant Must Prove Knowledge, Appreciation and Voluntary Acceptance of the Risk.

1. In order to rely on the defence of Voluntarily Assumption of Risk the Appellant must prove that the Respondent was fully aware of the risk, fully understood and appreciated the nature of the risk and voluntarily accepted the risk - *Roggenkamp v Bennett* (1950) 80 CLR 292, 300 (McTiernan and Williams JJ).
2. Mere knowledge of the risk alone is not enough - *Roggenkamp v Bennett* (1950) 80 CLR 292, 300 (McTiernan and Williams JJ).

2. The Respondent did not Voluntarily Assume Risk as he did not know of the Circumstances Creating the Risk.

1. The defence of Voluntary Assumption of Risk requires that the Respondent knew about the circumstances creating the risk - *Insurance Commissioner v Joyce* (1948) 77 CLR 39, 47 (Latham CJ).

2. The Respondent checked before catching the wave and did not see an obstruction. Also he believed he was a distance from the pipes. The Respondent did not know of the circumstances creating the risk.

3. The Respondent did not Voluntarily Assume Risk as he did not Fully Understand and Appreciate the Nature and Extent of the Danger.

1. The defence of Voluntary Assumption of Risk requires that the Respondent fully understood and appreciated the nature and extent of the risk - *Hadland v Council of the City of Blacktown*, unreported; FCt SCt of NSW; 40452/1996; 21 May 1997.
2. The Respondent, believing he was well clear of the pipes, thought when catching that wave that he had an unobstructed path to the beach. There was no way that at that point he understood or appreciated the nature and extent danger posed by catching the wave he did.

4. The Respondent did not Voluntarily Assume Risk as he did not Accept the Risk.

1. The defence of Voluntary Assumption of Risk requires that the Respondent voluntarily accepted the risk and consented to run the risk such that they would bear the loss rather than the party alleged to be negligent - *Hadland v Council of the City of Blacktown*, unreported; FCt SCt of NSW; 40452/1996; 21 May 1997.
 - a. The Respondent did not accept the risk or consent to run it at his own expense. He specifically checked for potential risks to avoid running them himself. He did not accept the risk.
2. If the Plaintiff (Respondent) believed the dangers would not materialise they can not have been said to have accepted those dangers - *Canterbury Municipal Council v Taylor* [2002] NSWCA 24 at [147].
 - a. The Respondent, assuming he was a distance away from the pipes, believed that the dangers would not materialise. He cannot said to have accepted the risk as he was of the opinion the risk didn't or wouldn't materialise.

Therefore, Hislop J correctly applied the test for Voluntary Assumption of Risk and thus correctly found that the Appellant could not rely on the defence.

Date: 15/05/06

Alex Ardvark – Junior Counsel for the Respondent

IN THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL

No. CA 84 of 2006

BETWEEN:

MANLY COUNCIL AND SYDNEY WATER CORPORATION

Appellant

and

BENNETT

Respondent

AUTHORITIES FOR THE RESPONDENT

(Junior Counsel for the Respondent, Alex Ardvard)

1. *Bennett v Manly Council and Sydney Water Corporation* [2006] NSWSC 242.
2. *Canterbury Municipal Council v Taylor* [2002] NSWCA 24.
3. *Hadland v Council of the City of Blacktown*, unreported; FCt SCt of NSW; 40452/1996; 21 May 1997.
4. *Insurance Commissioner v Joyce* (1948) 77 CLR 39.
5. *Roggenkamp v Bennett* (1950) 80 CLR 292.