SUPREME COURT OF QUEENSLAND

CITATION:	*Goodhue v Volunteer Marine Rescue Association Incorporated* [2015] QCA 234
PARTIES:	**BILL KRISTIAN GOODHUE** (applicant) **v** **VOLUNTEER MARINE RESCUE ASSOCIATION INCORPORATED** (respondent)
FILE NO/S:	Appeal No 2911 of 2015 DC No 257 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Southport – [2015] QDC 29
DELIVERED ON:	20 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	19 August 2015
JUDGES:	Margaret McMurdo P and Gotterson JA and Ann Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal refused.** **2. Applicant to pay the respondent's costs of the application on the standard basis.**
CATCHWORDS:	TORTS – NEGLIGENCE – PROOF OF NEGLIGENCE – WEIGHT AND CREDIBILITY OF EVIDENCE – where on 11 August 2003 the applicant anchored a vessel in an area known as "Marina Stadium" on the Spit at Southport and left for overseas – where the applicant returned on 6 November 2003 after being advised by a friend notifying him that the vessel was aground – where the applicant was unsuccessful in the District Court with an action for negligence against the Volunteer Marine Rescue for moving his vessel without his permission and re-anchoring it too close to the shore within the Marina Stadium, causing the vessel to run aground, resulting in damage to the vessel and its contents – where a critical issue resolved by the trial judge was that her Honour determined that the vessel was anchored by an Admiralty style anchor as opposed to a more substantial Danforth style anchor – where evidence given by a VMR volunteer was credible and not significantly impaired in cross-examination – where the witness was not being sued and he had no motive to lie – where said

witness was adamant that the anchor he saw was an Admiralty style anchor – where there was no direct evidence contradicting this witness – whether the conclusion of the trial judge was not supported by evidence – whether the appeal should be allowed

Civil Liability Act 2003 (Qld), s 39(1)
District Court of Queensland Act 1967 (Qld), s 118(3)

Commonwealth of Australia v Griffiths (2007) 70 NSWLR 268; [2007] NSWCA 370, cited
Devries v Australian National Railways Commission (1993) 177 CLR 472; [1993] HCA 78, cited
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, cited
Manly Council v Byrne [2004] NSWCA 123, cited
Morley v Australian Securities and Investments Commission (2010) 274 ALR 205; [2010] NSWCA 331, cited
Ringelstein v Redford Cattle Company Pty Limited [1995] 1 Qd R 433; [1994] QCA 14, cited

COUNSEL:	A J H Morris QC for the applicant S McNeil for the respondent
SOLICITORS:	Boss Lawyers for the applicant McCullough Robertson Lawyers for the respondent

[1] **MARGARET McMURDO P:** I agree with Gotterson JA's reasons for refusing this application for leave to appeal with costs.

[2] **GOTTERSON JA:** On 17 July 2009, Mr Bill Kristian Goodhue commenced a proceeding in the District Court at Southport against the Volunteer Marine Rescue Association Incorporated ("VMR"). Mr Goodhue claimed damages in the amount of $87,373.45 against the VMR. This proceeding arose out of events that took place between 11 August 2003 and 6 November 2003 in an area known as the "Marina Stadium" on the Spit at Southport, Queensland.

[3] Mr Goodhue is the owner of a vessel named "Warlock", a 12 metre ketch rigged yacht. This kind of yacht is commonly described as a ferro cement vessel. The VMR is an unincorporated association. Its Southport Squadron provides volunteer marine rescue services from a base to the south of the Marine Stadium area by giving assistance to persons and vessels in the marine environment when requested. It does this through the work of volunteer crews.

[4] On 11 August 2003, Mr Goodhue anchored Warlock in the Marine Stadium and left Australia for New Zealand. He returned to the Marine Stadium on 6 November 2003 after a friend notified him that the Warlock was aground on the western beach in the Marine Stadium.

[5] Mr Goodhue's claim against the VMR was based principally upon alleged negligence on the part of the volunteer agents in moving the Warlock without his permission on 25 October 2003 and re-anchoring it too close to the western shore within the Marina Stadium. This, Mr Goodhue alleged, caused the Warlock to run aground, resulting in damage to the vessel and its contents. The claim was also based upon breaches of duties alleged to have been owed by the VMR to Mr Goodhue to contact him and to continue supervision of the Warlock after it had been moved and until he had been contacted.[1]

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[1] Further Amended Statement of Claim: AB564-568.

[6] The VMR denied that it owed Mr Goodhue any duty of care and any breach of duty on its part or on the part of its volunteer agents. It admitted that "on or about 26 October 2003", the Warlock was moored in the Marina Stadium. It pleaded a case that the vessel was then unmanned, dragging its anchor and drifting towards other vessels anchored in the Marina Stadium; that it was a potential danger; and that the VMR's volunteer agents boarded the vessel to secure it, having first been granted permission to do so by the water police.[2] The VMR further alleged that the Warlock was moved, re-anchored in a competent manner and securely anchored by its agents on 25 October 2013.[3] As well, the VMR pleaded reliance upon the exclusion from personal civil liability for volunteers afforded by s 39 of the *Civil Liability Act* 2003 (Qld).

[7] After a trial over six days, judgment was given on 20 February 2015. Mr Goodhue's claim was dismissed. Judgment was given in favour of the VMR on its counterclaim for $200 together with interest thereon, for services rendered in recovering the Warlock at Mr Goodhue's request made to it by him on 7 November 2003. Mr Goodhue was ordered to pay the VMR's costs of the proceeding to be assessed on the standard basis.[4]

Application for leave to appeal

[8] On 20 March 2015, Mr Goodhue filed an application for leave to appeal pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) against the judgment. The application was heard on 19 August 2015. At the hearing of the application, senior counsel for Mr Goodhue informed the Court that reliance was placed upon grounds of appeal set out in an Amended Notice of Appeal dated 18 August 2015 which had been provided to the Court.[5]

[9] Argument on the application proceeded on the footing that the grounds of appeal in that document would be the grounds on which Mr Goodhue would rely if leave to appeal was granted. Resolution of the question whether leave should be granted requires an assessment of whether any of the grounds has reasonable prospects of success. Before turning to those grounds, I propose to outline the findings of the learned primary judge particularly with reference to issues relevant to the proposed appeal.

Relevant findings at first instance

[10] A critical issue that the learned trial judge was required to resolve was whether the Warlock was anchored by an Admiralty style anchor or a more substantial 70 kilogram Danforth style anchor at the time when the VMR personnel intervened on 25 October 2003. Her Honour summarised the evidence of Mr Goodhue and of Mr Peter Tune, a VMR volunteer with extensive offshore skipper experience who was in charge of the VMR's vessel, Apex III, at the time, on this issue as follows:

> "[101] … Mr Goodhue was adamant in his evidence that he definitely left Warlock anchored with the 70kg Danforth style anchor. I accept his evidence that he is an experienced sailor and usually secured Warlock in the stadium with the Danforth style anchor because the anchor's weight and design meant the vessel would not drag. When Mr Goodhue took Warlock out of the Stadium on trips prior to August 2003 he would usually leave the Danforth style

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2 Further Amended Defence, paragraph 4: AB570-571.
3 *Ibid*, paragraph 5: AB572.
4 AB654.
5 Tr1-2 ll19-25.

> anchor attached to a mooring buoy and use one of his other anchors, such as one of his Admiralty style anchors, to anchor the vessel at his destination.
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> [102] Mr Tune was equally adamant that the anchor he saw his Crewman Mr Armour pull out of the water on 25 October was an Admiralty style anchor, and not a 70kg Danforth style anchor. Both anchors are clearly distinguishable from each other on the evidence of both the plaintiff's witnesses and the defendant's witnesses. Every witness agreed, it would be impossible for one man to lift the Danforth style anchor up without the assistance of a winch. Mr Goodhue gave evidence that, it could take an hour for one person to lift the Danforth style anchor onto the deck with the assistance of the winch."[6]

[11] The learned trial judge found Mr Tune's evidence to be a thorough and consistent account. He was "an impressive witness". His evidence, her Honour found, was to be preferred where it was inconsistent with that of Mr Goodhue's witnesses.[7]

[12] After referring to respective submissions, her Honour reasoned as follows to her finding on that issue:

> "[104] Having accepted Mr Tune's evidence that an Admiralty style anchor was attached to Warlock on 25 October 2003, it may be the case that Mr Goodhue mistakenly thought he had anchored Warlock with the Danforth style anchor when he left for New Zealand in August, when in fact, he had omitted to change the anchor when returning from one of his earlier trips. If Mr Goodhue did leave the Danforth style anchor attached when he left for New Zealand, another person may have used Warlock while he was away and left the Admiralty style anchor attached.
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> [105] I am unable to be satisfied to the requisite standard that Mr Goodhue did in fact check that he had attached the Danforth style anchor to Warlock before leaving for New Zealand or that, alternatively there was not an intervening person or event, for example, someone else who used Mr Goodhue's vessel while he was away, changed the anchor to an Admiralty style anchor, and forgot to properly re-anchor the vessel with the Danforth style anchor upon return to the Marine Stadium. I do not have to decide this point, because I am satisfied that the Admiralty style anchor was attached to Warlock as at 25 October 2003."[8]

[13] This finding underpinned the learned trial judge's summary of findings of fact relevant to liability. The summary is in these terms:

> "[134] In about July or August 2003 Mr Goodhue anchored Warlock in Marine Stadium, in Southport. He anchored his vessel and left the country on 11 August 2003, not returning until 6 November 2003, by which time the vessel was lying on its port side (left side) on the western beach of the Marine Stadium.

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6 AB626-627.
7 Reasons [92]; AB624.
8 AB627-628.

[l35] There is no evidence of Warlock's movements between 11 August 2003 and 25 October 2003.

[136] On 25 October 2003 a person on a vessel called 'Manuhere' contacted the VMR Southport base to report that Warlock was 'dragging anchor in Marine Stadium'.

[137] In response to the call, Mr Tune and his crew travelled in the vessel Apex 3 into the Marine Stadium to assess the situation: The Water Police were contacted at 8:05am and gave the VMR permission to move Warlock.

[138] Mr Tune saw Warlock drifting towards Manuhere. He formed the opinion Warlock's anchor was dragging. He decided that, if the volunteers did not intercept Warlock immediately, and tow it away from Manuhere, it would collide with Manuhere, causing damage.

[139] Mr Tune established that the Water Police had given the VMR permission to board the unmanned Warlock. He saw Mr Armour pull up Warlock's anchor chain. He saw an Admiralty style anchor attached to the chain. He competently re-anchored Warlock approximately equidistant from the east and west shorelines of Marine Stadium. He did not anchor the vessel where the plaintiff's witnesses located the anchor on 7 November 2003. He ensured the vessel was holding its anchor before returning to the VMR base.

[140] Mr Tune returned later the same day to where he had anchored Warlock and confirmed Warlock was in the same position he and his crew had re-anchored it. One week later on either Saturday 1 November or Sunday 2 November 2003, he observed Warlock to be in the same position where he and his crew had re-anchored her.

[141] There is no reliable evidence of Warlock's movements between 2 November 2003 and 4 November 2003.

[142] Mr Goodhue and his friends found Warlock beached close to the Western Shore on 6 November 2003. On 7 November, Mr Goodhue and his friends located either the Danforth style anchor, or an Admiralty anchor within 10 metres of the shoreline, and attached by a chain to Warlock.

[143] Warlock suffered loss and damage as outlined by Mr Goodhue."[9] (footnotes omitted)

[14] Against the framework of this summary, her Honour concluded that there was no breach of duty of care by the VMR's agent, Mr Tune. The reasoning for that conclusion is expressed as follows:

"[153] The plaintiff's case involves the proposition that, from the time he left Warlock to the time he returned, nobody touched the boat aside from the defendant's crew on one occasion, and therefore, where he found the boat was where they left it. Therefore the defendant must have taken the boat to the position where the

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9 AB634-635.

plaintiff found it. Therefore unless I reject the defendant's witnesses' evidence about that point, then the plaintiff has failed to prove his case.

[154] In between these occurrences, the defendant admits one of its vessels attended the boat, found the boat adrift with only a light anchor and a short chain fitted. It re-anchored the boat in a different position from where the plaintiff says he found the boat and with a different anchor. The defendant did this about two weeks before the plaintiff found the boat in a different position.

[155] The plaintiff says I should not accept the defendant's evidence as to where they re-anchored the boat with an Admiralty style anchor.

[156] I am not prepared to draw that inference for a number of reasons. Having considered all the evidence, particularly the evidence of the defendant's principal witness Mr Tune, I accept his evidence as to what occurred. It necessarily follows that his account of what he did was not negligent."[10]

[15] Further, her Honour concluded that there was no relevant duty of care on the VMR's part owed to Mr Goodhue, and hence no breach of duty of care by it. As to that, her Honour said:

"[158] The plaintiff also says that, when they found the vessel and re-anchored it, the defendant should have contacted him or Mr Brooks. But what was the source of the defendant's duty to contact the plaintiff or Mr Brooks? In my view, the defendant did not have such a duty to the plaintiff. The defendant was responding to a rescue call from another party - the people on the vessel Manuhere, concerning the plaintiff's drifting vessel.

[159] That may have given rise to the duty to take reasonable care, not to cause any unreasonable harm to the plaintiffs vessel. That, in my view, is the limit of the duty. It was not their duty to inform Mr Goodhue. As long as the defendant's action of re-anchoring Warlock did not of itself add to any danger the plaintiff's vessel was suffering at the time, then the defendant has not breached any duty it owed to the plaintiff. The defendant's volunteers secured the plaintiffs vessel, as best they could, with the anchor that was attached to it at the time. The defendant's volunteers left the vessel in a safer state than they found it. In circumstances where they did that, there cannot be a duty to do something more than that. The defendant did not have a general duty to look after Mr Goodhue's boat. In circumstances where they were helping someone else, they had a duty not to cause any unreasonable harm to his boat. They did not breach that duty. There was not any duty on them to contact the plaintiff. There was not any general duty to care for the plaintiff's boat. Their duty was limited to leaving the boat in no worse of a situation than they had found it in."[11]

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10 AB637-638.
11 AB638-639.

[16] On the basis of these conclusions, her Honour held that Mr Goodhue's case failed.[12] Notwithstanding, her Honour gave consideration to the statutory defence that had been pleaded. She expressed a view that s 39 would have relieved the VMR in respect of any liability that it might otherwise have had for negligent acts of its volunteer agents.[13] Her Honour assessed damages on the claim at $58,000[14]

The grounds of appeal

[17] The following grounds of appeal are set out in the Amended Notice of Appeal:

> "1. The learned primary judge erred in fact in determining that the vessel Warlock was anchored between 11 August 2003 and 7 November 2003 by means of an Admiralty style anchor rather than a 70 kilogram Danforth style anchor, which conclusion was, respectfully, not supported by the evidence.
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> 2. The learned primary judge erred in failing to apply the principle in *Jones v Dunkel* (1959) 101 CLR 298 in relation to the absence of three witnesses for the Defendant, being the crew on the vessel Apex III on 25 October 2003.
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> 3. The learned trial judge erred by finding as fact but not deciding that it was more likely that a third person, Mr Brooks or Mr Woods, who had keys to Warlock's interior, may have intervened and replaced the Danforth anchor with an Admiralty anchor, in the absence of evidence of that fact.
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> 4. By reason of paragraphs 1, 2 and 3 above, the learned trial judge erred in accepting the Respondent's version of events, and in finding for the Defendant.
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> 5. The learned primary judge, erred in law in concluding that a community organisation cannot be vicariously liable for the negligent act of an individual volunteer pursuant to section 39 of the *Civil Laibility Act 2003*, by following *Commonwealth of Australia v Griffiths* [2007] NSWCA 370 rather than [*Ringelstein*] *v Redford Cattle Company Pty Ltd* [1995] 1 Qd R 433."

Ground 1

[18] This ground misstates the finding that was made. The learned trial judge found that the Warlock was moored by an Admiralty style anchor on 25 October 2003 at the point when the VMR's personnel intervened.[15] As her Honour explained, this finding was based on the testimony of Mr Tune who was a witness to the raising of the anchor. His evidence was more fully summarised by her at paragraph 63 in the Reasons as follows:

> "[63] [Mr Tune] directed Mr Armour to pull up Warlock's anchor while he moved the boat away from Manuhere. He moved Apex 3 forward slowly because he was concerned Warlock's anchor may foul Manuhere's anchor rope. He saw Mr Armour pull the

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12 Reasons [160]: AB639.
13 Reasons [176]: AB644.
14 Reasons [208].
15 Reasons [105]: AB627-628.

> anchor chain into the boat and saw an Admiralty style anchor attached to the chain. The vessels were in a depth of I5 feet of water according to Apex 3's echo sound equipment. Mr Tune formed the opinion that Warlock had less than 15 feet of chain hanging over board with the anchor attached because Warlock was drifting and the anchor appeared not to be embedded into the seabed. Mr Tune saw Mr Armour pull up the chain and anchor. He saw the anchor come out of the water and hanging clear of the water. Mr Tune was standing on Apex 3 only 8-10 metres away from the front of Warlock. He had a clear, unobstructed view of the anchor. He described it as an 'Admiralty type anchor' and agreed it was like a Popeye style anchor. He disagreed that Warlock's anchor was a Danforth style anchor that weighed 70 kilograms. He described Mr Armour as of slight build and said Mr Armour had no difficulty pulling up the chain with the anchor attached. He denied that Warlock was towed by Mr Armour looping a rope around the anchor chain and dragging the vessel with the anchor on the seabed, rather than attaching the tow rope to an object on the deck of the vessel, although he conceded he did not see exactly what Mr Armour attached the rope to."[16] (footnotes omitted)

[19] This summary accurately states Mr Tune's evidence-in-chief that the Warlock was anchored by an Admiralty style anchor.[17] He affirmed this evidence in cross-examination.[18] Further, Mr Tune rejected the proposition put to him in cross-examination that the Warlock had been anchored by a Danforth style anchor.[19] In so doing, he stated that Mr Armour was not strong enough to lift a 70 kilogram anchor on his own and without mechanical assistance.[20]

[20] In accepting Mr Tune's evidence, the learned trial judge rejected a submission made on behalf of Mr Goodhue, and renewed on this application, that she ought infer from evidence given by his witnesses[21] that the Warlock must have been anchored by a Danforth style anchor when the VMR personnel intervened and re-anchored the vessel with the same anchor (but in an unsafe manner or location). The evidence was to the effect that on 7 November 2003, a Danforth style anchor with a chain attached was found close to the Warlock and near the low water line.

[21] Her Honour was sceptical of the recollections of those witnesses as to the Warlock's location on 7 November 2003. She described it as "strikingly similar".[22] Her Honour considered that the recollections may have been tainted by the witnesses' friendship with Mr Goodhue.[23] She was inclined to regard their evidence as reconstruction, but not necessarily intended reconstruction.[24]

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16 AB618-619.
17 Tr5-60 ll7-38: AB405.
18 Tr5-106 ll10-40: AB451.
19 Tr5-90 ll11-12: AB435.
20 *Ibid* ll18-27.
21 See, particularly, Mr Christopher Morrow: Tr2-93 ll4-14: AB161; Tr2-93 ll34-38: AB166 and Mr John Woods: Tr3-63 ll1-9: AB243.
22 Reasons [98].
23 *Ibid*.
24 *Ibid*.

[22] It was further submitted that Mr Tune's evidence should have been rejected because if the Warlock had been anchored with an Admiralty style anchor in August 2003, then, on the evidence of Mr Nicholas Lockyer, a marine surveyor called in Mr Goodhue's case, "it would have moved long before 25 October".[25] The cogency of Mr Lockyer's evidence in this regard is diminished by a possibility, acknowledged by her Honour, that a third person may have intervened and changed anchors, replacing the anchor in place with an Admiralty style anchor.[26] Had that happened near 25 October 2003, then Mr Lockyer's evidence would not support a theory that the Warlock was not anchored by an Admiralty style anchor on 25 October 2003.

[23] In summary, Mr Goodhue has advanced arguments why findings based on Mr Tune's evidence ought not have been accepted. They are arguments with their own weaknesses. In my view, they are lacking in persuasion.

[24] On the other hand, Mr Tune's evidence was credible. It was not significantly impaired in cross-examination. He himself had not been sued. He had the protection of s 39(1) of the *Civil Liability Act* 2003 (Qld). There was no motive for him to lie.

[25] It was clearly open to her Honour to make the finding she did based upon Mr Tune's evidence. It could not be suggested, and has not been suggested, that in making the finding consistent with that evidence, her Honour failed to use, or palpably misused, her position in assessing Mr Tune's credibility, or acted on evidence inconsistent with facts incontrovertibly established by other evidence, or was glaringly improbable.[27] In truth, there was no direct evidence which contradicted that given by Mr Tune. This ground of appeal, therefore, has no realistic prospect of success.

Ground 2

[26] This ground of appeal is based upon the circumstance that, at trial, three crew members of the Apex III on 25 October 2003 were not called in the VMR's case. One of them was Mr Armour. Mr Tune was unable to remember the names of the other two.[28]

[27] The learned trial judge referred to this circumstance in her reasons, footnoting a reference to *Jones v Dunkel*.[29] Her Honour said:

> "[94] One feature of the defendant's case worth mentioning is that the defendant did not call any of the other crew who were on the rescue vessel with Mr Tune on 25 October 2003. This was not referred to by the defence witnesses during the trial, nor did the plaintiff seek any explanation from the defendant's witnesses as to why the other crew members were not called. There is no evidence before the court as to whether, after the passage of so many years, those witnesses were 'readily available' to give evidence. The defendant provided no explanation for Mr Armour's absence. Although, without these witnesses there is no corroboration of Mr Tune's version, I find him to be an accurate,

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25 Tr3-37 ll6-7: AB217.

26 Reasons [105]: AB627-628. It was open to her Honour to acknowledge such a possibility. There was evidence that there were Admiralty style anchors on board the Warlock and the evidence of Mr Goodhue's witnesses did not exclude such a possibility. See also the discussion of Ground 3.

27 As would be required to overturn her Honour's finding: *Devries v Australian National Railways Commission* (1993) 177 CLR 472, per Brennan, Gaudron and McHugh JJ at 479.

28 Tr5-35 ll37: AB380 – Tr5-36 l3: AB381.

29 (1959) 101 CLR 298 (at footnote 89: AB625).

> honest and reliable witness and am prepared to accept his evidence in the absence of the other crew member's evidence."[30] (footnote omitted)

[28] The rule in *Jones v Dunkel* is not one that requires a party to call other witnesses in order to corroborate evidence of a witness that has been called by the party. It concerns the drawing of inferences. It enables a tribunal of fact more confidently to draw an inference of fact in favour of a party from the opposing party's unexplained failure to call a witness whom that party would be expected to call in order to give evidence concerning the fact. However, as the New South Wales Court of Appeal in *Morley v Australian Securities and Investments Commission*[31] recently reminded, if a party's case is otherwise proved, the inference that the absent witness would not assist the party's case does not detract from the proof.

[29] Here, there was cogent proof from a witness who was present as to what occurred when the anchor on the Warlock was raised on 25 October 2003. There was no gap in Mr Tune's evidence that needed to be filled by evidence of other persons present. That, in itself, would provide an explanation for not calling them. In any event, the proof afforded by Mr Tune's evidence was not diminished by the absence of evidence given by such persons. This ground, too, has no realistic prospect of success.

Ground 3

[30] This ground of appeal also misstates a finding by the learned trial judge. Her Honour did not find as a fact that it was more likely that a third person, Mr Brooks or Mr Woods, may have intervened before 25 October 2003 and substituted a Danforth style anchor with an Admiralty style anchor. Both of those persons had keys to the interior of the Warlock. Nor, for that matter, did the learned trial judge find that Mr Goodhue had moored the Warlock with a Danforth style anchor in August 2003.

[31] In explaining her reasons for accepting Mr Tune's evidence, her Honour observed[32] that she was not satisfied on the balance of probabilities that Mr Goodhue had, in fact, checked to ensure that he had anchored the Warlock with a Danforth style anchor before he left for New Zealand. Nor was she satisfied to that standard on the evidence adduced in his case that an alternative possibility had not occurred. Her Honour gave as an example that a third person might have used the Warlock while Mr Goodhue was away, changed the anchor to an Admiralty style one and then forgot to re-anchor the vessel with a Danforth style anchor. Her Honour did not personalise that possibility as necessarily involving Mr Brooks or Mr Woods.

[32] Her Honour was, with respect, correct also to observe that it was unnecessary for her to make conclusive findings with respect to either of those possibilities. It was clearly open to her to make the finding consistent with Mr Tune's evidence without having to make conclusive findings concerning those possibilities. In my view, this ground of appeal cannot succeed.

Ground 4

[33] This ground of appeal, in effect, reassembles and restates the three preceding grounds of appeal. Its prospects of success are the same as for them. In the result, none of Grounds 1 to 4 is deserving of a grant of leave to appeal.

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30 AB625.

31 [2010] NSWCA 331; (2010) 274 ALR 205 per Spigelman CJ, Beazley and Giles JJA at [634]. See also *Manly Council v Byrne* [2004] NSWCA 123 at [44]–[55] and [69]–[74].

32 Reasons [105]: AB627.

Ground 5

[34] The question whether s 39 of the *Civil Liability Act* may be availed of by a community organisation in respect of negligent acts of its volunteer agents is an important one. There is divergent authority at the appellate level on the topic, as a comparison of the two cases mentioned in this ground of appeal reveals. In oral submissions, two additional interpretative issues concerning this and related provisions in the *Civil Liability Act* were canvassed.

[35] Ordinarily, issues of interpretation of provisions of general application such as these, would warrant a grant of leave to appeal under s 118(3). That is so, at least, when the interpretation to be preferred will determine the fate of the proceeding.

[36] Here, her Honour's interpretation of s 39 was *obiter*. She had found that none of the VMR's authorised agents had acted negligently. She had also found that the VMR did not itself owe any duty of care as pleaded. There is no realistic prospect that any of these liability findings would be overturned on appeal. In these circumstances, neither s 39 nor the other provisions could be engaged. That being so, it would be inappropriate for this Court here to venture opinion *obiter* on the interpretative aspects.

[37] I would therefore not favour a grant of leave to appeal confined to Ground 5. In refusing leave, I do not mean to convey any view with respect to the correctness of the interpretation adopted below.

Orders

[38] I would propose the following orders:

1. Application for leave to appeal refused.

2. The applicant is to pay the respondent's costs of the application on the standard basis.

[39] **ANN LYONS J:** I agree with the reasons of Gotterson JA and the orders he proposes.