Informed consent: The Review of the Law of Negligence and the utility of reference to NHMRC guidelines

The authors examine the need for medical practitioners to provide information to patients in light of the guidance of medical boards and the courts with respect to the CLAs.

Bill Madden Slater & Gordon and Tina Cockburn Queensland University of Technology

NSW Court of Appeal: case note on Jackson v Lithgow City Council

In this article, the author examines a recent case dealing with contributory negligence.

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Assessment of dependency damages where deceased died in domestic airline crash

The author discusses a recent case, Thornton v Lessbrook Pty Ltd t/as Transair, which highlights the difficulties courts face in assessing the likelihood of future outcomes.

Pru Connolly Moray & Agnew Lawyers

Shopping Centre Cleaning Case — Is My Cleaning System Reasonable?

This article examines a recent case dealing with a “slip and fall” in a shopping centre away from a “high risk area”.

Heidi Nolan Curwoods Lawyers

Legislation update
Informed consent: The *Review of the Law of Negligence* and the utility of reference to NHMRC guidelines

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Given that people have the right to decide for themselves whether or not to undergo medical treatment, the law has imposed on medical practitioners a duty to take reasonable care in relation to the provision of information. This duty is imposed so that patients are able to provide informed consent to treatment because information about material risks inherent in the treatment and other relevant information about benefits and risks of the procedure has been effectively communicated to them. There are two aspects of the duty: a proactive duty, whereby certain information must be provided even when the patient does not ask for it; and a reactive duty which obliges the practitioner to give certain information when he or she knows or ought to know that the patient wants to be given that information because it was asked for.

**Proactive duty to inform: review of negligence recommendations**

In discussing the proactive duty to inform almost 10 years ago, the *Review of the Law of Negligence* panel observed that the medical profession found the legal specification of this duty unsatisfactory because it gives insufficient guidance as to what information must be given to the patient in order to avoid legal liability for negligence. This may be described as a concern as to the content of the information to be provided, as opposed to the nature of the duty.

As to the nature of the duty, the Panel recommended that “duties to inform should be expressed as duties to take reasonable care” in order to “reassure doctors that the law does not require of them unrealistic standards of behaviour, even though the law does not defer to medical opinion in this area to the extent that it does in relation to treatment.”

As to content, the Review Panel thought it impractical and undesirable to attempt to frame detailed, prescriptive legislative provisions specifying the matters about which information must be given to satisfy the proactive duty to inform because the precise content of the obligation depends on the facts and circumstances of individual cases, which are likely to be extremely diverse and incapable of being dealt with in such a way.

The Panel recorded a suggestion that the medical colleges or the National Health and Medical Research Council (NHMRC) should develop guidelines, commenting:

> We have not been able to investigate the feasibility of such developments. However, our view is that while compliance (or non-compliance) with such advisory regimes would (in accordance with current law) be relevant to the legal issue of reasonable care, it could never be treated as conclusive of the issue.

**Civil liability legislation**

Following the Review recommendations, the civil liability legislation in Queensland, Tasmania and Victoria includes express provisions regarding the nature of the duty to inform. Presumably the remaining jurisdictions took the view that such provisions would not take matters beyond the common law. Although the wording of the legislative provisions which were enacted is not uniform, it appears that these provisions affirm the common law position.

Section 21 of the Civil Liability Act (Qld) provides:

> 21(1) A doctor does not breach a duty owed to a patient to warn of risk, before the patient undergoes any medical treatment (or at the time of being given medical advice) that will involve a risk of personal injury to the patient, unless the doctor at that time fails to give or arrange to be given to the patient the following information about the risk—

(a) information that a reasonable person in the patient’s position would, in the circumstances, require to enable the person to make a reasonably informed decision about whether to undergo the treatment or follow the advice;

(b) information that the doctor knows or ought reasonably to know the patient wants to be given before making the decision about whether to undergo the treatment or follow the advice.
The comparative Tasmanian provision, s 21 of Civil Liability Act 2002 (Tas), is essentially the same as the Queensland provision and provides:

2(1) A medical practitioner does not breach a duty owed to a patient to warn of risk, before the patient undergoes any medical treatment (or at the time of the patient being given medical advice) that will involve or give rise to a risk of personal injury to the patient, unless the medical practitioner at that time fails to give or arrange to be given to the patient the following information about the risk (whether or not the patient asks for the information):

(a) information that a reasonable person in the patient’s position would, in the circumstances, require to enable the person to make a reasonably informed decision about whether to undergo the treatment or follow the advice;

(b) information that the medical practitioner knows or ought reasonably to know the patient wants to be given before making the decision about whether to undergo the treatment or follow the advice.

(2) This section does not apply where a medical practitioner has to act promptly to avoid serious risk to the life or health of the patient and—

(a) the patient is not able to hear or respond to a warning about the risk to the patient; and

(b) there is not sufficient time for the medical practitioner to contact a person responsible for making a decision for the patient.

(3) In this section, “patient”, when used in a context of asking for or being given information, includes a person who has the responsibility for making a decision about the medical treatment to be undergone by a patient if the patient is under a legal disability.

In the Victorian legislation, Wrongs Act 1958 (Vic), s 50 most closely follows the Review panel recommendation and provides:

50. A person (the defendant) who owes a duty of care to another person (the plaintiff) to give a warning or other information to the plaintiff in respect of a risk or other matter, satisfies that duty of care if the defendant takes reasonable care in giving that warning or other information.

The legislative provisions reproduced above of course do not of themselves provide guidance as to the content of the information that the medical practitioner has to give to the patient in order to avoid legal liability for negligence in any particular case.

Good Medical Practice

In preparation for the introduction of national medical registration from July 2010, the Australian Medical Council, on behalf of all state and territory medical boards, developed a national code of professional conduct for medical practitioners.15 After 1 July 2010, under the National Registration and Accreditation Scheme, the Medical Board of Australia adopted and reissued the code with the minor modifications required to reflect the Health Practitioners Regulation National Law Act 2009 (the National Law).16 That Code “sets out the principles that characterise good medical practice and makes explicit the standards of ethical and professional conduct expected of doctors by their professional peers and the community.” 17 Entitled Good Medical Practice: A Code of Conduct for Doctors in Australia,18 the code includes a short passage on informed consent, albeit one that does not of itself provide guidance as to the content of the information that the medical practitioner should give to the patient in order to avoid legal liability for negligence. The relevant clause reads:

3.5 Informed consent

Informed consent is a person’s voluntary decision about medical care that is made with knowledge and understanding of the benefits and risks involved. The information that doctors need to give to patients is detailed in guidelines issued by the National Health and Medical Research Council.19 Good medical practice involves:

3.5.1 Providing information to patients in a way that they can understand before asking for their consent.
3.5.2 Obtaining informed consent or other valid authority before you undertake any examination, investigation or provide treatment (except in an emergency), or before involving patients in teaching or research.
3.5.3 Ensuring that your patients are informed about your fees and charges.
3.5.4 When referring a patient for investigation or treatment, advising the patient that there may be additional costs, which patients may wish to clarify before.

NHMRC Guidelines

By footnote, the Good Medical Practice Code20 refers to National Health and Medical Research Council (NHMRC) guidelines which were respectively reissued and issued by the NHMRC, two years after the publication of the Review Report. Those documents are:21

- General Guidelines for Medical Practitioners on Providing Information to Patients 200422
- Communicating with Patients: Advice for Medical Practitioners 200423
The NHMRC General Guidelines for Medical Practitioners on Providing Information to Patients provide guidance as to: information to be provided about their diagnosis and treatment; information to be provided in relation to risks; how to communicate information; the circumstances in which information should be withheld and what to do in the case of emergencies. The guidelines are reproduced below and it can be seen that the level of detail goes some way towards specifying the content of the information which should be given to patients:

INFORMATION TO BE GIVEN
Doctors should normally discuss the following information with their patients:
• the possible or likely nature of the illness or disease;
• the proposed approach to investigation, diagnosis and treatment:
  — what the proposed approach entails
  — the expected benefits
  — common side effects and material risks of any intervention
  — whether the intervention is conventional or experimental
  — who will undertake the intervention
• other options for investigation, diagnosis and treatment;
• the degree of uncertainty of any diagnosis arrived at;
• the degree of uncertainty about the therapeutic outcome;
• the likely consequences of not choosing the proposed diagnostic procedure or treatment, or of not having any procedure or treatment at all;
• any significant long term physical, emotional, mental, social, sexual, or other outcome which may be associated with a proposed intervention;
• the time involved; and
• the costs involved, including out of pocket costs.

INFORMING PATIENTS OF RISKS
Doctors should give information about the risks of any intervention, especially those that are likely to influence the patient’s decisions. Known risks should be disclosed when an adverse outcome is common even though the detriment is slight, or when an adverse outcome is severe even though its occurrence is rare. A doctor’s judgement about how to convey risks will be influenced by:
• the seriousness of the patient’s condition; for example, the manner of giving information might need to be modified if the patient were too ill or badly injured to digest a detailed explanation;
• the nature of the intervention; for example, whether it is complex or straightforward, or whether it is necessary or purely discretionary. Complex interventions require more information, as do interventions where the patient has no illness;
• the likelihood of harm and the degree of possible harm; more information is required the greater the risk of harm and the more serious it is likely to be;
• the questions the patient asks; when giving information, doctors should encourage the patient to ask questions and should answer them as fully as possible. Such questions will help the doctor to find out what is important to the patient;
• the patient’s temperament, attitude and level of understanding; every patient is entitled to information, but these characteristics may provide guidance to the form it takes; and
• current accepted medical practice.

PRESENTING INFORMATION
The way the doctor gives information should help a patient understand the illness, management options, and the reasons for any intervention. It may sometimes be helpful to convey information in more than one session. The doctor should:
• communicate information and opinions in a form the patient should be able to understand;
• allow the patient sufficient time to make a decision. The patient should be encouraged to reflect on opinions, ask more questions, consult with the family, a friend or advisor. The patient should be assisted in seeking other medical opinion where this is requested;
• repeat key information to help the patient understand and remember it;
• give written information or use diagrams, where appropriate, in addition to talking to the patient;
• pay careful attention to the patient’s responses to help identify what has or has not been understood; and
• use a competent interpreter when the patient is not fluent in English.

WITHHOLDING INFORMATION
Information should be withheld in very limited circumstances only:
• if the doctor judges on reasonable grounds that the patient’s physical or mental health might be seriously harmed by the information; or
• if the patient expressly directs the doctor to make the decisions, and does not want the offered information. Even in this case, the doctor should give the patient basic information about the illness and the proposed intervention.

4 EMERGENCIES
In an emergency, when immediate intervention is necessary to preserve life or prevent serious harm, it may not be possible to provide information.

In addition to the General Guidelines for Medical Practitioners on Providing Information to Patients 2004 (the General Guidelines), the NHMRC also published a companion document which focuses on how the provision of information occurs, entitled Communicating with Patients: Advice for medical practitioners. The companion document draws attention to issues such as the physical environment, communication techniques, cultural & social matters, interpreters and the like.

The foreword to the General Guidelines comments that “while it is recognised that these guidelines might
be consulted in legal proceedings, it is not their purpose to set mandatory standards of behaviour in giving information. Rather it is to foster better communication between doctor and patient, so that patients are able, with their doctors, to make the best decisions about their medical care”. Those sentiments are repeated in the body of the document, as follows:

The guidelines do not change the law, nor do they set a mandatory standard. Rather, they reflect the doctor’s existing common law responsibility always to take reasonable care. In appropriate circumstances, divergence from the guidelines would not inevitably be regarded as negligent or unprofessional behaviour. The guidelines may be consulted in disciplinary or civil proceedings in deciding whether the doctor has behaved reasonably in giving information, although ultimately it will be the role of the court to decide the reasonableness of a doctor’s behaviour in a given case.25

Judicial comment supports the view expressed in the Guideline that such pronouncements will not be taken as mandatory standards. For example, albeit in another context, in Thompson v Johnson & Johnson Pty Ltd27 the Victorian Court of Appeal said:

Whether or not the NHMRC recommended that a warning be given was not determinative of the question of reasonable care, for to accept that proposition would permit the respondents to abrogate the duty of reasonable care owed by them. It is not the response of such a body which determines whether a person in the position of the respondents is or is not negligent. That is for the courts to decide. However, it is a relevant fact to be taken into account when determining whether reasonable care has been exercised.28

The utility of the NHMRC guidelines in informed consent cases under the civil liability legislation

Although the civil liability legislation in Queensland,29 Tasmania30 and Victoria31 contains express provisions regarding the nature of the duty to inform, it appears that these provisions do not modify the position at common law. In addition, the civil liability legislation provisions which specifically provide for reference to peer professional opinion in treatment cases are specifically stated not to apply to failure to warn cases.32 Accordingly the court will continue to be the final arbiter as to whether standards of reasonable care in the provision of information have been met in those jurisdictions.

Under the civil liability legislation, there are at least two opportunities for the consideration of material such as NHMRC guidelines. Using the New South Wales legislation as an illustration, Civil Liability Act 2002 (NSW) s 5D provides:

5D General principles
(1) A person is not negligent in failing to take precautions against a risk of harm unless
(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
(b) the risk was not insignificant, and
(c) in the circumstances, a reasonable person in the person’s position would have taken those precautions.

It may be argued that the Guideline could be taken by a court as a good source from which to make a finding as to whether a reasonable person in the person’s position would have taken those precautions, in the circumstances where the reasonable person in question is a medical practitioner and the context is that of an alleged failure to comply with the proactive duty to inform.

Again using the New South Wales legislation as an illustration, Civil Liability Act 2002 (NSW) s 5D provides:

5D General principles
(1) A determination that negligence caused particular harm comprises the following elements:
(a) that the negligence was a necessary condition of the occurrence of the harm (“factual causation”), and
(b) that it is appropriate for the scope of the negligent person’s liability to extend to the harm so caused (“scope of liability”).

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

In the same factual context it can be argued that material such as the NHMRC Guideline could be taken by a court as a good source from which to find support for a conclusion that it is appropriate for the scope of the negligent person’s liability to extend to the harm so caused (scope of liability) by reference to whether or not and why responsibility for the harm should be imposed on the negligent party.

Concluding remarks

Although rarely referred to in litigation in the years that have followed the Review Report, there may well be some merit in more frequent judicial reference to the NHMRC General Guidelines for Medical Practitioners on Providing Information to Patients 2004.

To the extent of that the NHMRC Guideline falls short of providing the precise content of information that must be given to the patient in order to avoid legal liability for negligence in any particular case, reference may also usefully be made to publications outlining the content of information which should be provided to patients in the context of a particular procedure. Such publications may be produced by the various medical colleges,33 or other health organisations of which the Centre for Genetics Education34 is a good example.

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Footnotes
1. Schloendorff v Society of New York Hospital 211 NY 125 (1914) at 126 (Cardozo J); Secretary, Department of Health and Community Services (NT) v JWB and SMB (Marion’s case) (1992) 175 CLR 218 at 234; 106 ALR 385; 66 ALJR 300; 6 AJFL 97.
2. See generally Rogers v Whitaker (1992) 175 CLR 479; 109 ALR 625; 67 ALJR 47; BC9202689.
5. Ibid, [3.56].
7. Ibid, [3.46].
8. Ibid, [3.57].
14. For a discussion Madden and McIlwraith, 28–29.
17. See 1.1 Purpose of the Code.
20. Footnote 6 to the code.
21. Note however that the document General Guidelines for Medical Practitioners on Providing Information to Patients was originally issued in 1993 following the publication of a report by the Australian, Victorian and New South Wales Law Reform Commission on the issue of informed consent. In their June 1989 report, the Law Reform Commissions had recommended that the NHMRC formulate guidelines for the medical profession concerning the provision of information to patients about proposed treatment and procedures. The Commissions rejected the notion that the common law standard of reasonable care concerning the provision of information to patients should be replaced by a statutory standard because legislation was too rigid and incapable of covering the wide range of situations which might arise. Guidelines could provide greater flexibility and include examples to illustrate general situations.
26. Ibid.
28. Ibid, 494. See also: Florida Hotels Pty Ltd v Mayo (1965) 113 CLR 598 at 593, 601; 39 ALJR 50; BC6500470.
32. See for example Civil Liability 2002 (NSW) s 5P.
33. For example, the Royal Australian & New Zealand College of Obstetricians and Gynaecologists produces Patient Information Pamphlets on 23 topics from exercise during pregnancy to antenatal care and routine tests during pregnancy to caesarean section. Some of those provide information regarding envisaged procedures or treatments.
34. The Centre for Genetics Education (CGE), based at Royal North Shore Hospital in Sydney, was established in 1989 as the education arm of the NSW Genetics service of NSW Health. From 1989–2000 it was known as the NSW Genetics Education Program. See for example the factsheet regarding prenatal testing (CVS and amniocentesis) available online at http://www.genetics.com.au/pdf/factsheets/fs17c.pdf.
NSW Court of Appeal: case note on Jackson v Lithgow City Council [2010] NSWCA 136; BC201003932

Catherine Kelso Norton Rose Australia

Shortly before 7 am on 8 July 2002, the plaintiff, Mr Jackson, was found unconscious lying in a concrete drain in a park in Lithgow. He had suffered serious head injuries, probable fractured vertebra, a fractured wrist and cuts and abrasions. Mr Jackson had taken his dogs for a walk at about 3.30 am that morning while intoxicated and had no memory of the accident. Nobody had seen the accident and there was no direct evidence as to how Mr Jackson came to be in the drain.

Mr Jackson sued Lithgow City Council (Council), the local council having the care and management of the park, alleging that, as a result of the Council’s negligence, he had fallen over a low unfenced retaining wall and had fallen down approximately 1.5 metres onto the concrete drain where he was found.

Trial proceedings
At first instance, the District Court gave judgment for the Council with costs. The trial judge found that the Council owed Mr Jackson a duty to exercise reasonable care for his safety and that such duty was breached by the Council not taking steps to avoid the risk of foreseeable injury to someone falling over the wall at night. However, the trial judge was not satisfied that the negligence of the Council was a cause of the injuries that Mr Jackson had sustained and this was determinative on the issue of liability.

First appeal
On appeal, the Court of Appeal set aside the judgment entered at trial and gave judgment for Mr Jackson in an amount of $203,475 together with interest and costs. The focus of Mr Jackson’s appeal was the trial judge’s conclusions that the evidence as a whole did not prove causation. The Council did not seek to challenge the trial judge’s findings on duty of care and breach on appeal.

In allowing Mr Jackson’s appeal, the Court of Appeal had particular regard to an ambulance retrieval record that had been tendered in evidence at trial. That document recorded a number of matters relevant to the question of causation, including the ambulance officers’ observations of the scene, their opinion as to what happened and the position of Mr Jackson’s body, which was consistent with the view that he had fallen from the wall. President Allsop described the document as “crucial in the resolution of this appeal” as it allowed an inference to be drawn from the evidence that Mr Jackson suffered a significant fall while walking down the hill towards the wall in the dark. The Court of Appeal accepted the trial judge’s finding that Mr Jackson was “clearly intoxicated at the time of the accident” and, while the accident was likely to have occurred even had he not been intoxicated, it was not possible to conclude that his intoxication made no contribution. Accordingly, the statutory presumption (in s 50 of the Civil Liability Act 2002 (NSW)) that there was operative contributory negligence was engaged and a mandatory 25% allowance for contributory negligence was imposed on Mr Jackson’s overall damages award.

Second appeal
The Council sought special leave to appeal to the High Court. It was agreed by the parties that the version of the ambulance retrieval record that was before the Court of Appeal on the first appeal was not an accurate reproduction of the document (a question mark had been cut off on the photocopy in the original appeal papers). Accordingly, the High Court set aside the orders of the Court of Appeal and remitted the matter to that court for further hearing. The second appeal was heard before the same bench as had heard the first appeal (Allsop P, Basten JA and Grove J).

In his reasons for judgment on the second appeal, Allsop P (Basten JA and Grove J concurring) reached the same conclusions on the issue of causation as his Honour had in the first appeal, namely, that the ambulance retrieval record, when added to the totality of the evidence, made it more likely than not that Mr Jackson had suffered his injuries as a result of a serious fall over the wall in the dark.
Implications

The critical issue at trial and on both appeals was causation. None of the judges expressed any doubt that a council would owe someone in the position of Mr Jackson, walking in the park at night, a duty to exercise reasonable care for his or her safety notwithstanding their intoxication, and that such duty was breached by the Council failing to take steps to avoid the risk of foreseeable injury to someone falling over the wall at night. Ultimately, Mr Jackson’s intoxication was taken into account in the assessment of damages and a discount of 25% of the overall award was imposed to reflect contributory negligence, even though the accident was likely to have occurred had he not been intoxicated.

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Footnotes
Assessment of dependency damages where deceased died in domestic airline crash

Pru Connolly Moray & Agnew

Thornton v Lessbrook Pty Ltd [2010] QCS 308; BC201006125

Background

The plaintiff was engaged to Ms Sally Urquhart (the deceased) who was killed when the aircraft in which she was a passenger crashed in far north Queensland in 2005. The plaintiff’s claim for pecuniary loss was brought pursuant to the Civil Aviation (Carriers Liability) Act 1964 (QLD).

The decision examines the assessment of damages where the deceased was likely to maintain her career and earn more than the plaintiff.

Civil Aviation (Carriers Liability) Act 1959 (Cth) limits the liability of a domestic carrier to $500,000. Both the plaintiff and the deceased were police officers and, in particular, the deceased was a police officer with a very promising future. The deceased joined the police service with degrees in science and law and the court heard evidence from a senior police officer that the deceased would have achieved rapid promotion through the ranks of the police service.

Issues

There were a number of issues the court was asked to address concerning the assessment of damages; the likely earnings of the plaintiff and the likely earnings of the deceased. The court was required to consider a number of contingencies including the continuation of the relationship between the plaintiff and the deceased, the possibility of children and the impact of a new relationship which the plaintiff had commenced.

The court also had to determine whether the statutory cap of $500,000 included costs and interest and whether the assessment should take into account benefits arising from the deceased’s death such as a life insurance policy and payment from a superannuation fund.

It was accepted that the plaintiff and the deceased contemplated having at least two children. Debate surrounded the approach to an assessment including whether parental leave would be paid or unpaid, the length of any parental leave and the financial impact of any children particularly on the level of dependency of the plaintiff.

His Honour pointed out that through an apparent oversight, the reforms effected by s 23A of the Supreme Court Act 1995 (QLD) did not affect the assessment of damages. Accordingly, the contingency of a new relationship was governed by the principles discussed by the High Court in DeSales v Ingrilli (No 2) (2003) 212 CLR 338; 196 ALR 500; [2003] HCA 16; BC200301501.

The decision

The court concluded that the deceased’s income would have exceeded that of the plaintiff. Of note, his Honour commented that the use of Professor Luntz’s table (Assessment of Damages for Personal Injury and Death fourth edition) is at best a guide. His Honour pointed out that one limitation on using the percentages derived from Luntz’s table 9.1 is that it was based upon the assumption that children were born at the time of trial. His Honour stressed that any assessment must take into account the possibility of infertility, the possibility the couple had only one child, as well as the possibility that the plaintiff and the deceased may have had more than two children. His Honour noted the absence of actuarial evidence.

The plaintiff gave evidence that he was currently in a relationship although not as a de facto and since the crash had previously been in a short-term relationship for several months. The court observed that the plaintiff’s new partner earned substantially less than the deceased and the relationship was in its early days in comparison with the relationship between the plaintiff and the deceased.

His Honour concluded that this was not an appropriate case for a “separate and substantial discount or deduction for the new relationship”. His Honour stressed that he was not in a position to reach any conclusion based upon “evidence of the probable financial consequences” of the relationship. The absence of evidence that the new relationship will bring financial advantage in the long term to the plaintiff was highlighted by the court. Instead, his Honour thought it more appropriate to take account of the possibility of financial advantage through the new relationship by increasing slightly the discount, but noted that the increase in the discount for contingencies should be moderate.
His Honour determined that for past loss of financial dependency a discount of 15% was appropriate. For future loss of financial dependency, his Honour considered a discount of 20% to be appropriate.

The plaintiff had received a lump sum payment from WorkCover and as it offset any interest, his Honour considered it unnecessary for him to decide the point as to whether the cap of $500,000 included interest.

However, his Honour did not accept that the limit on liability included costs:

In the absence of clear words that suggest the cap on liability extends to the discretionary power to awards costs I conclude that the statutory limit applies in this case to the plaintiff’s claim for damages but not to my discretion to order costs.

In this case, his Honour determined that the benefits the plaintiff received by way of superannuation benefits and death benefits should not be brought into account by way of reduction. Section 38 of the Civil Aviation (Carriers Liability) Act 1959 dictated that those benefits should not be taken into account by way of a reduction of damages.

His Honour’s assessment of damages totalled $526,232 and given the limit on liability, judgment was entered in the sum of $500,000 plus costs.

Comments

The decision is a reminder that assessments in dependency claims are complicated and involve exhaustive examination of a number of contingencies pertinent to each case. His Honour confirmed that the Luntz table is to be used as a guide only. Further, if an assessment is to be calculated outside the s 23A of the Supreme Court Act (QLD) reforms, and a new relationship is to produce a significant reduction, there must be concrete evidence which demonstrates that part or all of the plaintiff’s loss will be replaced by benefits received from the new spouse.

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Shopping Centre Cleaning Case — Is My Cleaning System Reasonable?

Heidi Nolan Curwoods Lawyers

Arabi v Glad Cleaning Service Pty Ltd [2010] NSWCA 208; BC201006028

New South Wales Court of Appeal

In Brief

• An occupier of commercial premises owes a duty to take reasonable care to avoid a foreseeable risk of injury to a lawful entrant who is using reasonable care for his or her own safety.

• The question of whether a proper system of cleaning and inspection is in place must be considered in light of s 5B(1)(c) and (2) of the Civil Liability Act 2002 (the Act) amongst other relevant things. In this regard, the plaintiff carries the burden of proving that a defendant failed to take such precautions against a risk of harm to the plaintiff as in the circumstances a reasonable person in the position of the defendant would have taken.

• An insight as to the nature of evidence required to determine whether there has been a breach of duty of care in a slipping case is provided by the Court of Appeal.

• While it was unnecessary to determine the issue in this case, the Court of Appeal reiterated that even if a plaintiff establishes a breach of duty of care he or she must still prove the breach caused his or her injuries by reference to s 5E of the Act.

Background

On 31 May 2006, Mr Arabi (plaintiff) slipped and fell on a pedestrian ramp at the Bankstown Centro Shopping Centre, sustaining injuries to his right knee. The Centre consisted of three levels, the accident occurring on a ramp between the middle and upper levels. It was the plaintiff’s evidence that he was walking up the ramp, talking on his mobile phone when he approached the landing and his right leg slipped and he fell forward landing on his knees. The plaintiff required two right knee arthroscopies as a result of the injury.

The plaintiff indicated that he did not see any liquid on the ramp prior to his fall. However, after the accident he noticed a sticky substance of an orange or brown colour about one metre square on the ramp where he slipped. He stated that the spillage had footprints and wheel marks through it. The plaintiff said that if he had looked where he was about to put his feet he would have seen the substance. The plaintiff did not identify the precise time his accident occurred merely stating he went to the Centre at 12 noon and then went to the Commonwealth Bank before proceeding to the ramp. He did not say how long he was at the bank. The plaintiff reported the accident to the Centre the next day and an Incident Report completed by Mr Mourgarbel, security officer, identified the time of accident as 12 noon.

The records of cleaning inspections of the area showed that a loop of this area had been completed at 11.45 am, 12.15 pm, 12.35 pm, 12.55 pm, 1.10 pm and 1.30 pm. Records also showed that the cleaners performed a total of 26 loops of that area throughout the day.

The plaintiff commenced proceedings in the District Court of New South Wales against both the occupier of the shopping centre (CPT) and the company responsible for the cleaning at the Centre, Glad Cleaning Service Pty Limited (Glad), (jointly the defendants).

This matter was heard at first instance by the late Goldring DCJ. His Honour considered that the real issue in terms of breach of duty was whether the system of cleaning was reasonable.

Evidence was given by the cleaner on duty at the time that there were no food shops on the upper level other than one coffee shop, and there were only two food outlets on the middle level, being an ice cream parlour and a popcorn shop. Goldring DCJ accepted the cleaner’s evidence that in these areas, continuous cleaning with only short intervals between inspections was not as important as in areas with food outlets. His Honour found that the system of cleaning in operation in that area of cleaning approximately every 15 or 20 minutes was reasonable. As such he found that no breach of duty of care had been demonstrated.

Goldring DCJ indicated that had the plaintiff succeeded, he would have been awarded the sum of $74,184, being $60,000 for loss of future earning capacity, out of pocket expenses of $4,184 and future out of pocket expenses of $10,000, to be reduced by 35% due
to contributory negligence. Despite the two operative procedures his Honour did not believe the plaintiff's non economic loss exceeded the 15% of a most extreme case threshold required for the awarding of damages under this head of damage.

Court of Appeal Decision

The plaintiff appealed this decision, citing a failure on the part of Goldring DCJ to provide sufficient reasons for his finding that the system of cleaning was reasonable and therefore involved no breach of the duty owed to the plaintiff. The plaintiff submitted that the evidence given by the cleaner suggesting that the cleaning contract required inspections every 10–15 minutes, rather than at 20 minute intervals which seemed to be the norm between 11.45 am and 1.30 pm, and that this should have been taken into consideration, as well as the plaintiff’s evidence that the spillage had footmarks and trolley tracks through it and therefore looked as though it had “been there for sometime”.

Sackville AJA delivered the unanimous decision of the court. His Honour stated that while Goldring DCJ identified that the relevant issue was whether the system of cleaning in place was reasonable, the critical issue was whether the plaintiff had proven that the defendants had failed to take such precautions against a risk of harm to the plaintiff as, in the circumstances, a reasonable person in the position of the defendants would have taken, as required under s 5B(1)(c) of the Act.

Sackville AJA also stated that when considering whether the precautions taken by the defendants were reasonable Goldring DCJ was bound to consider the matters raised in s 5B(2) of the Act, which are as follows:

(a) the probability that the harm would occur if care were not taken,
(b) the likely seriousness of the harm,
(c) the burden of taking precautions to avoid the risk of harm,
(d) the social utility of the activity that creates the risk of harm.

Sackville AJA considered that Goldring DCJ’s reasons for his findings were not clear enough to expose his thought processes. However, he said that in this case, as neither party challenged the findings of primary fact, and as the question of whether the defendants breached their duty of care to the plaintiff turned on these findings and uncontroversial evidence, the Court of Appeal was in a position to determine the question of breach of duty of care. The situation would be different if the findings depended on issues of credit.

The plaintiff argued that a system of cleaning and inspection entailing 10 minute rotations should have been in place. Sackville AJA noted however that “no evidence was adduced to establish the steps a reasonable person in the position of the [defendants] — that is, occupiers of a large shopping mall — would have taken to prevent the risk of harm from spillages” in relation to the area the subject of this accident. He indicated that, for example, no evidence of industry standards or practices of other shopping malls was provided, nor evidence that demonstrated a general practice of inspections of at least 10 minutes. Sackville AJA also indicated that there was no expert evidence discussing the nature of the risk present at the Centre, and practices that could have been undertaken to minimise the risk, including costs of any such measures relevant to the criteria in s 5B(2) of the Act.

Specifically, his Honour found that the evidence presented did not establish the precise number and location of food outlets nearby and the risks these presented to the ramp where the plaintiff fell. Sackville AJA noted that evidence such as this is not necessary in all cases, and reaffirmed the decision of Kocis v SE Dickens Pty Ltd, in which it was said that every slipping case must depend on its own circumstances. He also said that lack of evidence as to general practices in shopping centres may not be relevant where an occupier does not have a system of inspection in place or a plaintiff can establish that a system was in place but was not in operation at the time of the accident: Brady v Girvan Bros Pty Ltd, Rose v Abbey Orchard Property Investments Pty Ltd.

That was not the case in the matter before the court however. The defendants in this matter had in place a system that required inspection approximately every 15–20 minutes. It was the cleaner’s evidence that there could be slight variations to this time period if other maintenance issues or spills arose for example, meaning that the rotation period was slowed down.

Sackville AJA referred to contractual arrangements in place between an occupier and a cleaner, and commented that these arrangements may support an inference that the contractual requirements represent the appropriate precautions that should be taken by a prudent and reasonable occupier to minimise risk of injury to patrons. In saying this, Sackville AJA referred to the decision of Dean v Stockland Property Management Pty Ltd, in which he said that a cleaning contract was relied on to demonstrate a significant departure from the contractual system warranting a finding of negligence against the occupier or cleaner. It is noted however, that in the case of Dean v Stockland Property Management Pty Ltd, the Court of Appeal remitted the matter to the District Court for retrial and that while the plaintiff certainly argued that the contract should have been read in this way at first instance, no finding was made on this point.
In the present case, the cleaning contract was not tendered, and the evidence of the cleaner concerning rotation periods was used as evidence as to times in which these rotations were carried out. While there was some inconsistency between whether the requirement was between 10 and 15 minutes or 15 and 20 minutes, Sackville AJA stated of the differences that:

... any variations were relatively minor and certainly did not involve a termination of, or substantial interruption to, the system of inspection. In the absence of evidence that the variations reflected a departure from the standards to be expected of a reasonable person in the position of the respondents, this court cannot infer that an interval of 25 minutes or even 30 minutes involved a breach of duty to the appellant.

His Honour ultimately found that the plaintiff had not satisfied the burden of proving that the defendants had breached the duty of care they owed to the plaintiff as a customer of the shopping centre.

Sackville AJA chose not to determine whether the plaintiff would have proved on the balance of probabilities that the injury was causally linked to a breach of duty. He did however, state that in determining causation a court must have regard to s 5E of the Act. He also stated that in most slipping cases this is done by showing how long the spillage had been on the ground.

After making reference to earlier decisions his Honour found that it was possible to draw inferences on causation when there was no system or the system was not in place on the day. However, he stated this may be harder to do in cases such as this where there was a system of regular inspection. Without deciding the issue, he commented that he thought it was doubtful whether the plaintiff would have discharged the burden in this matter on this issue.

In regards to quantum, the Court of Appeal stated that had the appeal on liability been successful the matter would have been remitted to the District Court for re-assessment on the basis the trial judge’s reasons for quantum were insufficient.

Implications

The case reaffirms that when determining questions of breach the court must have reference to s 5B of the Act and that the plaintiff carries the onus.

In a spillage case once breach of duty has been established it is necessary for a plaintiff to prove that the breach caused his or her injuries. This involves proving that a proper system of cleaning would have avoided his or her injuries.

While not referring to the decision in Mercouris v Westfield Shopping Centre Management Co Pty Ltd\(^\text{7}\) (where 10–15 minutes inspections in a low risk area was found to be adequate) it is apparent from that case and other appellate authorities in respect of spillage cases that the system of inspection in low risk areas of shopping centres away from food courts is less stringent than in high risk areas. However, it is a question for the court to decide, dependent on the facts in each case, whether the system of cleaning inspections is reasonable in all the circumstances.

The contractual arrangements between an occupier and cleaner, depending on the circumstances, may support an inference that a departure from the contractual system constitutes a breach of duty, subject to the question of causation being satisfied, to warrant a finding of negligence against the occupier or cleaner.

We expect that as a result of this decision, plaintiff lawyers will revise their evidence in preparation of cases. We would also expect to see an increase in risk assessment expert reports served on behalf of plaintiffs in an attempt to demonstrate that high standards of cleaning should be required in shopping centres. Heidi Nolan, Lawyer, Curwoods Lawyers.

Footnotes

1. Hodgson JA, Sackville AJA and Harrison J.
LEGISLATION update

Civil Liability Act 2002 (NSW)
Amended by Courts Legislation Amendment Act 2010. Assented to on 28 June 2010. Schedule 1.6, which commenced on assent, inserted a new s 26X Limitation on exemplary, punitive and aggravated damages against protected defendant in cases of vicarious liability.


Civil Liability Act 2003 (Qld)
Minor amendment by Justice and Other Legislation Amendment Act 2010. Assent 14 October 2010; commencement (Sch): to be proclaimed:

Amended by Civil Liability and Other Legislation Amendment Act 2010 No 9. Passed on 11 March 2010; commenced on 17 March 2010; s 4 & 5; s 9–11; s 16, to the extent it inserts the definition s 59A damages; Pt 4 and s 41 commenced on 1 July 2010.

The Act will effect the standard indexation of monetary amounts claimable and costs recoverable. It will also abolish the statutory limitation period (with retrospective application) for certain dust-disease claims and enable a de facto spouse to claim damages for deprivation of the benefits of the family relationship.

Civil Liability Act 1936 (SA)
Statutes Amendment and Repeal (Fair Trading) Act 2009 No 39 was assented to on 23 July 2009 and was proclaimed 3 September 2009. Sections 7 and 8, however, which amend s 38 (No duty to warn of obvious risk) have not yet commenced.

Civil Liability Act 2002 (Tas)
Minor amendment by the Health Practitioner Regulation National Law (Tasmania) (Consequential Amendments) Act 2010, commenced 1 July 2010.

Civil Liability Act 2002 (WA)
Amended by Health Practitioner Regulation National Law (WA) Act 2010. The Act amends the definition of health professional and medical qualifications. Assented to 30 August 2010; commencement: 18 October 2010 (excl s 41(2); NYP).

Proposed amendment by Health, Safety and Civil Liability (Children in Schools and Child Care Services) Bill 2010. The Bill proposes to implement a recommendation of the Western Australian Anaphylaxis Expert Working Committee report that child care staff and teachers are protected from civil liability where they administer medication to a child experiencing an anaphylactic reaction when that child care staff or teacher has acted in good faith and without recklessness.

Civil Law (Wrongs) Act 2002 (ACT)
Last amended by the Health Practitioner Regulation National Law (ACT) Act 2010 Pt 2.3 of Sch 2, to amend the definition of “health service”, commenced 1 July 2010.

Wrongs Act 1958 (Vic)


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