
Pritchard v Racecage Pty Ltd (1997) ATPR 41-534 (Federal Court of Australia: Full Court: Branson, Spender and Olney JJ)

Facts

The decision of the Full Federal Court in the above case opens the way for a final decision in what may well be one of the most interesting "damages causation" debates in a long time. The facts of this case have been previously set out in my case note of the trial decision [see (1996) Newc. LR Vol 1 No 3 pp 109-118]. For present purposes, they can be considerably condensed. The reader is referred to the case note of the trial decision for further details.

Racecage Pty Ltd ("Racecage") conducted a motor sports rally between Darwin and Ayers Rock known as the "Cannonball Run". Mr Pritchard (the deceased) agreed to act as an officer at this rally. He assumed that it would be safe to do so. He was killed by a competitor's vehicle whilst carrying out his duties as an official. Mrs Pritchard, as administrator of the deceased's estate brought proceedings on her own behalf, on behalf of the estate of the deceased and as next friend for her three children. She alleged that Racecage had engaged in misleading or deceptive conduct under s52 of the *Trade Practices Act* and in unconscionable conduct. The primary Judge tried certain issues as separate questions prior to trial. He determined all of these issues adversely to Mrs Pritchard and struck out her claims on the basis that she had no cause of action. Mrs Pritchard appealed to the Full Federal Court.

The case was pleaded only under the *Trade Practices Act*. The trial judge noted that the applicant's case, as pleaded, was distanced "as far as possible from a 'road accident' claim".

The Decision

The leading Full Court judgment was written by Branson J with whom Spender and Olney JJ agreed (Spender J adding some short additional comments of his own). The judgment of Branson J, effectively being that of the whole of the Court, will be the only judgment here discussed.

The issues canvassed by her Honour and the decisions in relation to them are set out below.

1. The operation of the *Motor Accidents Compensation Act* and the *Motor Vehicles Act* (Northern Territory)

The above Acts are the Northern Territory's compensation statutes covering personal damages as a result of motor vehicle accidents and other matters relating to motor vehicles and their use. At trial, it was held that the deceased's death was a consequence of a motor vehicle accident and that the *Trade Practices Act* was not intended to apply to accidents of this kind.

On appeal, her Honour found that the above legislation, as a whole, is intended to be limited in its operation to damages caused by the conduct of a person in charge of a motor vehicle and causes of action in most, if not all, cases will be based on negligence. The legislation does not purport to make the Territory Insurance Office liable for claims for misleading or deceptive conduct or unconscionable conduct.

Her Honour found, therefore, that the case pleaded was outside the Territory's motor vehicle legislation. It was, therefore, not necessary to determine whether the Territory legislation would be a valid law if on its true construction it disclosed an intention to deprive a person of a cause of action otherwise available to them under the *Trade Practices Act*.

Therefore, Mrs Pritchard in her respective capacities was not precluded by Territory motor vehicle legislation from pursuing a claim for misleading, deceptive or unconscionable conduct under the *Trade Practices Act*. The holding of law to the contrary at trial was, therefore, circumvented on appeal and this bar to recovery was removed by the Full Federal Court decision.

2. Are the Applicant and her children precluded from claiming loss or damage under the *Trade Practices Act* under the rule in *Baker v Bolton* (1808) 170 ER 1033?

Under s4K of the *Trade Practices Act* loss or damage includes injury. Her Honour determined that the word "injury" had its ordinary meaning

and not any strict legal meaning. So there was no reason to read the words down by the common law decision in *Baker v Bolton* (1808) 170 ER 1033 which held that "in a civil court, the death of a human being could not be complained of as an injury".

An "injury", according to the Macquarie Dictionary, extends to "harm of any kind done or sustained". This plainly includes bodily injury and extends to other types of harm. In *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) ATPR 41-022 in the High Court, it was not disputed that, if misleading or deceptive conduct was proven, personal injury damages were recoverable. Prior cases (and many were cited by her Honour) had held that the term "loss or damage" is very broad in concept.

On the pleadings, it was contended by the applicant that Mrs Pritchard and her children could recover damages for loss of support by the deceased, for grief and suffering and for funeral expenses; that Mrs Pritchard could claim for loss of consortium; and that the children could claim for loss of the parental guidance and care of a father.

Her Honour determined that, assuming that the relevant connection could be established between these factors and the misleading or unconscionable conduct of the respondents of which she complained, recovery was not precluded by the rule in *Baker v Bolton*.

3. Can the applicants, her children and the estate suffer "loss or damage" under the *Trade Practices Act*?

The respondents denied that there was "loss or damage" under the *Trade Practices Act* suffered by Mrs Pritchard, the deceased's estate or her children. This argument was based on the plea that s82 of the *Trade Practices Act* does not permit the personal representative of a deceased to bring an action and any loss suffered by Mrs Pritchard or her children was not recoverable.

Her Honour held that an estate cannot satisfy the requirement by being "a person" (as required by s82 of the *Trade Practices Act*) who suffers loss or damage.

As regards the other claims, her Honour held:

(a) The question of whether Territory vehicle legislation permits the survival of causes of action is irrelevant to trade practices issues for reasons set out in 1 above; and

(b) There is no reason to read down the expression "loss or damage" for the reasons set out in 2 above.

Accordingly, the deceased's estate could not recover loss or damage under the *Trade Practices Act* but it was open to Mrs Pritchard and her children to do so.

4. Did any action that the deceased may have pursuant to the Trade Practices Act survive his death? Did the *Judiciary Act* pick up the Territory survival of action legislation?

It was contended on behalf of Mrs Pritchard that, if s82 of the *Trade Practices Act* did not itself give the deceased's estate a remedy, ss79 and 80 of the *Judiciary Act* (Cwth) picked up the *Compensation (Fatal Injuries) Act* of the Northern Territory, thereby filling in the insufficiency created by the absence of a Commonwealth law permitting the survival of action. The above sections of the *Judiciary Act* relevantly provide that the statute law in force in a State or Territory shall, if not inconsistent with federal laws, govern all courts in the exercise of civil and criminal jurisdiction.

Her Honour held that the *Trade Practices Act* does not give rise to an action on behalf of a deceased estate. Nothing in the *Judiciary Act* could be relied upon to create such a right. Any attempt to use the *Judiciary Act* in this way would be an attempt to use the law of the Territory or the common law in a way which was inconsistent with the law of the Commonwealth.

Therefore, the inability of the estate to claim trade practices damages found in 3 above was not assisted by the *Judiciary Act*. The estate had no claim for damages under the *Trade Practices Act*.

5. Does the Court have power to make orders against the respondent under s87 of the *Trade Practices Act* (giving the Court power to make a number of wide ranging "other orders") to compensate:

- (a) the applicant; or
- (b) the deceased's estate; or
- (c) the children

or, in each case, does the Court have power to make an order under s87 to prevent or reduce any loss or damage likely to be suffered by reason of the death of the deceased?

Her Honour stated that the exact nature of the issue raised by the above question was, to her, unclear. However, under this question, she examined the question of reliance and causation in the context of a claim for damages under the *Trade Practices Act*.

At trial, it had been held that the deceased's death had not been caused "by" the misleading or deceptive conduct of the respondent. Thus damages under the *Trade Practices Act* could not be recovered. This was probably the major reason for the trial judge striking out the whole of the applicant's case at the pleading stage.

On appeal, her Honour noted, as a starting point, that it is not an

essential element of a s52 cause of action, that the applicant relied upon the conduct of the respondent. A person may rely upon the conduct of someone else, as the "rival trader" cases make clear.

Whether a person has suffered damage "by conduct of another person" within s82 of the *Trade Practices Act* is a question of fact. Her Honour referred to the High Court decision in *Wardley Australia Ltd v Western Australia* (1992) ATPR 41-189 in which case the word "by" was discussed by Mason CJ in particular. Mason CJ in that case regarded the word "by" as "a curious word to use" in the case of a trade practices statutory cause of action. One might, his Honour said, have expected the use of words such as:

"by reason of";
"by means of";
"in consequence of"; or
"as a result of".

However, the word "by" is one which "clearly expresses the notion of causation without defining or elucidating it". Given this, Mason CJ concluded that it was appropriate to take up the common law concept of causation most recently discussed in the High Court in *March v Stramare (E&MH) Pty Ltd* (1991) 171 CLR 506 except insofar as that concept may have been modified by the Act. If Parliament intended to say something else, his Honour said, it would have been natural and easy to have said so.

Her Honour, Justice Branson, noted that in *March v Stramare*, Mason CJ pointed out that "at law a person may be responsible for damage when his or her wrongful conduct is one of a number of conditions sufficient to produce that damage".

The issue of the "real cause" of the death of the deceased was not, therefore, the appropriate issue for debate. The applicant had to establish as a matter of fact that the loss and damage which she claimed that she and her children had suffered was "caused or materially contributed to" by the respondents (see Mason CJ *March v Stramare* at p514). Until evidence given on this issue was complete, no confident answer could be given to the question of whether Mrs Pritchard and her children were entitled to relief under the *Trade Practices Act*. In her Honour's view, it was premature to attempt to apply "common sense to the facts of (the) ... particular case" (*March v Stramare*, Mason CJ at p515) at a time earlier than the completion of the applicants' evidence. Nothing in the Act, on its face, showed an intention necessarily to exclude recovery of motor vehicle damages under the *Trade Practices Act* and, therefore, the usual position should apply and that matter was not to be determined until all of the applicants' evidence was before the Court.

6. Unconscionable Conduct

At trial, it was held that there was no unconscionable conduct by the respondents and that the late Mr Pritchard had been under no special disability vis-a-vis the respondent. It was also held that the applicant failed in this claim on "causation grounds" and that, in any event, an unconscionable conduct claim had to be based on some transaction. At trial the applicant also, therefore, failed because there was relevant "transaction".

Her Honour commented that it cannot be said that the argument in favour of a wide construction of s51AA of the *Trade Practices Act* is untenable or doomed to failure. Counsel for the applicant alleged an abuse by the respondents of their relationship with the deceased and emphasised the vulnerability of the deceased who was recruited as a volunteer to act in the interests of the respondents.

Her Honour noted that, on a number of occasions, it had been said that it is impossible to describe all the circumstances in which relief on the grounds of unconscionability will be granted. The views of Kirby P in *Breen v Williams* (1994) 35 NSWLR 522 at 543-544 were cited, his Honour in that case noting how changes in society and its complexity must necessarily change the Court's attitude to giving relief in circumstances involving the obligations of one citizen to another.

Thus unconscionability was a matter to be based on a careful examination of the facts of each case, the precise relationship between the parties and their respective abilities and vulnerabilities. A claim of unconscionability should not be struck out at the pleading stage on the basis that no cause of action had been disclosed. All the evidence should be heard.

Quo Vadis?

The trial judge found against Mrs Pritchard on all grounds. The Full Federal Court has re-opened the possibility that the *Trade Practices Act* may be applicable in this case.

The trial judge became involved in an analysis of the Territory motor vehicle accident compensation legislation and how it sat, under the Constitution, with the Commonwealth *Trade Practices Act*. The Full Federal Court sidelined all this analysis by holding that the Territory motor vehicle legislation was not aimed at holding the Territory Insurance Office liable for misleading conduct. Therefore, the trade practices claim was outside the relevant Territory legislation and was not precluded by it.

The Full Federal Court found that the deceased's estate could not bring a claim after death of the deceased but it was open to Mrs Pritchard

and the children to bring a claim for losses they occasioned as a result of the death of the deceased. The trial judge's conclusions were based on a non-survival of actions under the *Trade Practices Act*. The Full Federal Court's conclusions were based on an expansive view of the terms "loss or damage" in the *Trade Practices Act*. The Full Federal Court's conclusions may well expand the frontiers of the *Trade Practices Act* and the kind of damages which can be recovered under it.

The real question in the case is still unanswered but it is now the subject of decision after full evidence. The trial judge determined that there was no causation between the conduct involved and the death of Mr Pritchard. The Full Federal Court leaves the issue open. The applicant now has to establish that the loss or damage she and her children suffered was caused, or materially contributed to, by the respondents. Likewise, the unconscionable conduct question, struck out by the trial judge, remains for evaluation on the basis of the relationship between the parties and vulnerabilities. Clearly enough, the Full Federal Court does not believe that some "transaction" is a pre-requisite to liability for unconscionable conduct and this too, may well expand the scope of the *Trade Practices Act's* unconscionability provisions.

The case at trial was an interesting one - as much upon constitutional issues as anything else. The Full Federal Court has, however, sidelined these constitutional issues. The Full Federal Court decision makes the case potentially one of the most interesting ones on damages causation which has come before the courts for a long time.

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