Duty of care in trotting collision

Neville Bruce Hargraves v Brian Hancock

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The plaintiff was a trainer and driver of trotting horses and on 24 March, 1992 he was involved in a race collision which occurred at the Bathurst Paceway. The plaintiff suffered serious injuries including fracture to the right tibia and ankle. He sued the defendant in negligence alleging that it was the manner of his driving that caused the collision and therefore his injury. On behalf of the defendant it was argued that, in the circumstances that appertain to the trotting industry, a collision such as that which occurred is an inherent part of the entire enterprise, a risk to which the plaintiff had his eyes thoroughly open when he participated, and one that he willingly accepted. Further, it was argued that mere inadvertence or error of judgment on the part of the defendant is insufficient to establish liability in negligence.

Her Honour Justice Simpson referred to the decisions of *Rootes v Shelton* and *Johnston v Frazer.* In *Rootes v Shelton* Barwick CJ wrote:

"By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises and, if it does, its extent must necessarily depend in each case upon its own circumstances. In this connection, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non observance necessarily constitute a breach of any duty found to exist" (p385).

Kitto J wrote:

"I cannot think that there is anything new or mysterious about the application of the law of negligence to a sport or a game. It requires only that the tribunal of fact apply itself to the same kind of questions of fact as arise in other cases of personal injury by negligence. It must do so, of course, under judicial guidance as to what the law has to say upon the questions whether, in the situation in which the plaintiff's injuries were caused, the defendant owed him a duty to take care not to harm him, what the extent of the duty was if a duty did exist, and what causal relation the plaintiff must prove between an act or omission by the defendant which was a breach of the duty and the plaintiff's injury" (p387).

Taylor J considered it clear that a participant in a sport or game voluntarily assumes such risk of injury as is inherent in the sport itself, but that the mere fact of his participation in no way leads to the conclusion that other participants have no duty of care towards him, or that he has voluntarily accepted the consequences of any breach of whatever duty they owe him. Such matters are questions of fact to be determined in the circumstances of each case.

In *Johnston v Frazer,* a case which arose out of a horse race in which it was alleged that one jockey rode negligently causing injury to another, the Court of Appeal concluded that the test of negligence to be applied is that of a generalised duty of care without precise formulations for different categories of relationship between the parties. The test, therefore, to be applied is that of the reasonable rider (in that case) or driver (in this case) participating in a relevant race.

The question with which I have to concern myself is simply whether the defendant owed a duty of care to the plaintiff, and, if so, whether he acted in breach of that duty.

The defendant clearly owed the plaintiff a duty to take reasonable care in the circumstances. The true question is what that duty of care demanded of him, and whether his conduct fell short of meeting that standard.

The plaintiff participated in a sport which carries with it certain risks, and that the speed at which the sport is conducted increases those risks. Far from persuading me that that circumstance suggests that the defendant owes the plaintiff no duty of care or that it diminishes the extent of the duty, it persuades me more strongly that the defendant did owe the plaintiff a duty of care, and that what was encompassed in that duty is significantly greater than would have been the case in a sport carrying fewer, or lesser risks. This, it seems to me, is consistent with the decision of the High Court in *Wyong Shire Council v Shirt.*

Damages were awarded in favour of the plaintiff in the sum of $370,008.00.

In the same accident a promising pacer was badly injured. The owners of that pacer successfully sued Hancock for the loss of opportunity to win prize money and the claim was settled for the sum of $65,000.00. ■

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