BEN WHITE, QLD

Maternal duties owed to unborn children while driving

Bowditch v McEwan [2002] QCA 172*

The Facts

The first defendant is the driver of a motor vehicle who was involved in a collision. The accident occurred while she was three months pregnant. Her son is the plaintiff who alleges that he was injured as an unborn foetus as a result of this collision. Prior to trial, the plaintiff sought to resolve this issue: did his mother owe him a duty of care in relation to this potentially negligent driving?

The Trial Judge

The trial judge found that the first defendant did owe a duty of care to her unborn son while driving. The decision turned on a choice between two competing cases: *Lynch v Lynch*[1] and *Dobson v Dobson*[2]. The key to distinguishing these cases is how broadly the potential duty was framed. In *Dobson*, the Canadian Supreme Court considered the possibility of a *general* maternal duty of care, the existence of which it eventually rejected on policy grounds. Of particular concern for the court were the difficulties in articulating a judicial standard of conduct for pregnant women and the dangers of infringing their rights. In contrast, the New South Wales Court of Appeal in *Lynch* recognised that in the limited context of *driving*, a mother owed a duty to her unborn child. In framing the duty more narrowly, the Court of Appeal was able to avoid many of the policy difficulties that concerned the Canadian Supreme Court.

The trial judge criticised the Canadian Court for making the decision more difficult by framing the duty so broadly.[3] She was also critical of the role that values and emotion played in informing their policy judgments.[4] Her Honour's preferred view was to address the specific issue before her, as *Lynch* had done, and recognise that in the context of driving, a mother owes a duty of care to her unborn child. The policy concerns that cloud a more general maternal duty are avoided and in fact, the trial judge suggested that policy considerations might actually favour recognising such a duty. She referred to the "clear social policy decision by the legislature" that underpinned the compulsory third party insurance for motor vehicle accidents.[5]

The Court of Appeal

The Queensland Court of Appeal dismissed the first defendant's appeal and said that they had little to add to the trial judge's reasoning.[6] It was emphasised though that the decision was confined to driving and "says nothing" about whether a duty is owed in other contexts such as when a mother smokes during her pregnancy.[7]

Comment

Subject to a High Court appeal, as the second intermediate appellate court to decide the matter, *Bowditch v McEwan* settles the issue that a mother owes a duty of care to her unborn child while driving. Possibly counsel was prompted to test the authority of *Lynch* in light of the 1999 case of *Dobson*. With this challenge rejected, the issue then becomes whether this maternal duty might be extended to other conduct, for example, drug taking during pregnancy.

Any extension of liability is very unlikely. The Queensland Court of Appeal was very careful to distinguish its decision from other types of maternal conduct. The 'driving exception' is unique because it does not infringe women's rights, the standard of care owed when driving is capable of judicial determination, and there are policy reasons that favour its recognition such as the availability of insurance. It is this unique nature of driving that prompted such a duty to be statutorily recognised in the United Kingdom.[8] Although not likely to develop the law further in the foreseeable future, *Bowditch v McEwan* represents a common sense approach to a difficult problem. PL

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Footnotes:

[*] Unreported, Queensland Court of Appeal, Appeal No 11576 of 2001, de Jersey CJ, McPherson JA, Atkinson J, 17 May 2002.

[1] [1991] 25 NSWLR 411.

[2] [1999] 174 DLR (4th) 1.

[3] *Bowditch v McEwan* [2002] QSC 448 at para 29.

[4] Id at para 21, 25-28.

[5] Id at para 33.

[6] *Bowditch v McEwan* [2002] QCA 172 at para 7.

[7] Id at para 13.

[8] *Congenital Disabilities (Civil Liability) Act 1976* (UK) s2.

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The case of disappearing public liability

Miller v Council of the Shire of Livingstone [2002] QSC 180

Picture this for a scenario and ask yourself- is it fact or fiction?

Mark and Ben are brothers. They go out one afternoon. They visit a few pubs, play a bit of pool and consume about 10 drinks each before midnight, at which point they decide to go home.

The way home is by a footpath which runs next to a channel. The footpath slopes slightly toward the bank. There is a fence separating the footpath from the bank. The path runs from town to the populated area. It is a well known way to get home late at night because taxis are not reliable at that hour.

The boys run part of the way and walk some of it. They know the area well; they have been there many times before.

At one stage Mark runs ahead of Ben. He looks around but can't see him. Where did he go? Mark finds him a short time later, at the bottom of the bank, laying at right angles to the foot path, with his head facing the footpath. Ben is severely injured.

Ben sues the local council and the roads department. Quantum is settled at $1.6 million. The only issue is liability (and contribution between the defendants). The allegations of negligence are:

- the fence was too low.
- there was no warning about the fence being too low.
- the edge of the path was too close to the fence.
- the area was poorly lit.

The judge goes to the scene and finds that the lighting is adequate. He looks at the fence and finds that it is too low. But the plaintiff still loses. How can this be?

While there was no Australian standard that could be applied directly, the standard that applies to platforms, stairways and ladders requires a rail between 90cm and 110cm tall. This fence is anywhere between 70cm and 86cm above the footpath. The fence was probably 90-or-so cm tall initially, but the footpath which was added years later raised the ground height about 10cm.

An engineer gives evidence that a person's center of gravity is at about 58% of the height of the person. In this case, the plaintiff being 188cm tall, his center of gravity is about 109cm making it easy to stumble and fall over the fence.

So far we have a breach of duty, so what is the problem? Well, unfortunately for the plaintiff he could not remember anything about the accident. There were no witnesses to how the plaintiff fell, the closest person to it being his brother.

According to the judge, there were at least a number of possibilities, all equally plausible, about how the plaintiff found himself at the bottom of the bank. He may have walked around the fence to urinate, slipped and fell off the edge. He may have tried to hide from his brother as a joke and lost his balance. The judge did say that these were just possibilities, but the plaintiff could not discount them.

Therefore the plaintiff did not discharge his onus of proof and failed to show that the low fence contributed or caused the fall.

If you think this can't happen it can, and it did: see *Miller v Council of the Shire of Livingstone* [2002] QSC 180 a decision of the Queensland Supreme Court delivered on 21 June 2002. PL

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