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It's just not cricket:

Woods v Multi-Sport Holdings

Introduction

Those that cry the law of negligence is too plaintiff-friendly might take a look at some recent cases. For example, in *Modbury Triangle Shopping Centre Pty Ltd v Anzil*[1] the High Court found that the duty of care owed by an occupier of land did not extend to taking measures to protect a video shop employee from a criminal attack when he was leaving work at night after the car park lights had been turned off.

Then there is the decision of the High Court in *Woods v Multi-Sport Holdings*[2]. Again, even the purest negligence cynic might find sympathy with Michael Woods, a 32-year-old male who was blinded in one eye in his second game of indoor cricket at an Australian indoor cricket arena while batting. To add insult to injury, Mr Woods was a county (state level) outdoor cricketer in England. The injury was the result of a full toss to Woods when he was batting, at which he attempted a "pull shot". When he failed to connect properly, it caused the ball to ricochet off his bat, hitting him in the right eye.[3] He sued the occupier, who was also the organiser of the recreational league in which the teams played.

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The case was lost at all levels, including 3-2 in the High Court. Only when it reached the High Court did any judge agree with Mr Woods' claim of negligence. At trial, the respondent claimed that Mr Woods was contributorily negligent due to his error in timing and/or lack of skill in playing the shot. This argument was not pursued in the High Court. Although Woods had raised issues such as the possibility that the usual warning sign had not been displayed on the day he played, some issues were not pursued on appeal. By the time the matter got to the High Court, the particulars of negligence relied upon were two:

1) the respondent failed to provide any warning or install any warning signs to warn the plaintiff of the dangers of indoor cricket; in particular the risk of serious eye injury; and
2) the respondent failed to provide the plaintiff with any or any proper eye protection or guarding while playing cricket.

As the Chief Justice commented in *Woods*, the trial judge, French DCJ, accepted that the respondent owed a duty of care to the appellant. The duty owed by an occupier of private land to entrants has been formulated in *Australian Safeway Stores Pty Ltd v Zaluzna*[4]. The existence of the duty was not in dispute: at issue was the content of the duty and, in particular, whether there had been a breach of duty. French DCJ accepted in fact that because the respondent organised and controlled games played at its facility, its responsibility to players extended beyond the state of the premises. Hence the argument centred around what steps the respondent ought reasonably to have taken in the discharge of its duty of care.

Unlike the classic case of *Wyong Shire Council v Shirt*[5] this case by no means concerned a risk that might have been considered far fetched or fanciful. Rather, the activity at issue was inherently risky, and the majority of the High Court, like French J at first instance, were of the view that the obviousness of the risk was of relevance. French DCJ concluded that the risk of a player being struck in the face by a cricket ball was in fact so obvious that reasonableness did not require the respondent to warn players about it.[6]

Evidence was provided that the risk was substantially increased by the confined space in which, and speed at which, the game is played, and the way in which the players dive, slide and collide. In the High Court, Gleeson CJ and Callinan J in particular were of the view that risk of significant injury in fast-moving sport is blatant. The detail of risks in the evidence presented in *Woods* concerned solely the risks of eye injury. Those alone sound sufficiently ominous as to make one question why anyone would play such a game. Hence it is interesting to consider that had there been a trial of judge and jury, then the issue of the steps that a respondent ▶

ought reasonably to have taken would, as Gleeson CJ observes, have been for the jury to decide as the tribunal of fact.[7]

There was evidence not only of the risks of the game to the eye, but further that the indoor cricket ball, having a softer centre, does pose a peculiar risk to eyes, in that it will not simply fracture the eye socket, but tends to distort (being softer) on impact with bone. Hence there was a risk that a ball could protrude into the eye itself. There was medical evidence that the risks of eye injury could only be prevented by a full helmet with a face guard or grid, such as those used for outdoor cricket. There was evidence that not only had no helmets been designed for indoor cricket but the rules of the game actually discourage the use of helmets, and a player who wishes to wear one is required to obtain special permission. The rationale for the aversion is that a hard helmet in a small space is a risk to every other player, as well as to the batter if he or she slides into the crease, since the peak of the helmet could bounce off the ground causing whiplash.

There was also evidence that no special helmet has been developed that would necessarily prevent a slightly smaller indoor ball from penetrating the standard cricket helmet/visor.

The sole voices uttered in dissent across the entire court spectrum were those of Kirby and McHugh JJ in the High Court. While their judgments are brief, they make important points. McHugh J concludes that Multi-Sport breached its duty to Mr Woods in two respects: by failing to provide a protective helmet and by failing to warn him of the danger of sustaining an eye injury while he was playing indoor cricket.

In arriving at this conclusion, McHugh J continues with his arguments about the need to quantify "judicial facts" (including statistics on numbers and the level of eye injuries): an approach about which Callinan J in the majority expresses caution. However, in the view of McHugh J, the cost of injuries to society and the effects on individuals has played a role in raising

the standard of care required of those who owe duties of care. Besides this, there has been an increased appreciation of the likely causes of harm to the body and the means to avoid them. Further, French DCJ erred in finding that the Australian Indoor Cricket Foundation (AICF) code rather than the common law of negligence could determine the standard of care.

Kirby J also argued that there had been far too great an emphasis upon the AICF code, and notes that the AICF rules concentrate more on uniforms and dress regulations than ensuring the safety of players.

In the dissenting view, a test case judgment could be one way of making the game safer in that it would force the indoor cricket "industry" to develop a suitable helmet and mandate it. Whereas in essence, the view of the other judges (that is, those at all levels) is that it is unfair to hold the defendant liable if helmets were neither reasonably available nor widespread, and the issue of the warning sign is not major.

Conclusion

In light of the case law to date regarding professional liability, the decisions in this case are somewhat difficult to credit. In *Rogers v Whitaker*[8] the High Court held that a determination as to whether a medical professional breached its duty of care to a patient would not be based solely on the opinion of other medical professionals. A court could find a doctor to be negligent even if he or she acted in accordance with standard practice of the time, though this has been the subject of a recommendation by Senator Helen Coonan's recent Panel of Eminent Persons' Review of the Law of Negligence which favours the reinstatement of a modified version of the Bolam principle.

If the medical profession cannot dictate standards allowing its constituents to escape negligence claims, then, with respect, it seems strange that the majority of the High Court – together with a unanimous Full Court and trial judge – could so allow a sporting association. One cannot help but recall the wry observation of Jonathan Saul that if economists were doctors, they would today be mired in liability suits! Yet it still appears that in certain walks of professional life the law of negligence is not succeeding in its imperial expansion.

There are obvious risks of injury in every walk of life, but someone somewhere has some control over most of them. This area of law seeks to balance the responsibility for those risks. In the context of players voluntarily using facilities for recreational purposes, where the sporting operators review their rules and drawing on statistical evidence of injury, they may escape liability under the principles of this decision.[9] Where they fail to do so, they may be liable. In the view of this commentator, the sheer magnitude of injury in Australia poses ample evidence for the need to recognise the remedial role of negligence rather than relying upon internal forms of regulation where the occasional injury will be unlikely to prompt greater attention to general safety. PL

Footnotes:

1. [2000] HCA 61.
2. [2002] HCA 9.
3. Taken from the judgement of Gleeson, CJ.
4. [1987] 162 CLR 479.
5. [1980] 146 CLR 40.
6. Taken from the judgment of Gleeson CJ.
7. Ibid.
8. [1992] 175 CLR 479.
9. Greg Moroney, *The Biggs Brief* Vol 2, Ed. 2., June-July 2002: "Obvious risk of injury – a win for sporting ventures", p. 1.