TRACEY CARVER, QLD

Contributory negligence

Moore v Woodforth [2003] NSWCA 9, 6 February 2003

If a plaintiff, with full knowledge, voluntarily accepts a risk of injury, they will be unable to recover damages in a negligence action due to the defence of *volenti non fit injuria*, or voluntary assumption of risk.

In *Moore v Woodforth*,[1] the New South Wales Court of Appeal was called upon to determine the application of this defence and the issue of contributory negligence in circumstances where a snorkeller was hit by a motorboat travelling in a navigational channel.

Given that concurrent use of waterways by both pleasure craft and individuals is a common occurrence, this case is of importance to plaintiff lawyers seeking to determine the required balancing of rights.

Background

The plaintiff was injured when hit by the propeller of a motorboat owned and driven by the defendant. Moore was snorkelling for the purpose of spear fishing when he saw the boat directly approaching him. He dived under the boat in an attempt to avoid collision.

In the District Court, Woodforth was found negligent and a defence of voluntary assumption of risk was rejected. However, Moore's damages were reduced by 40% on account of his own contributory negligence.

On appeal, Moore challenged the finding of contributory negligence and the damages assessment, while Woodforth cross-appealed against the finding of negligence and the rejection of the defence.

Decision

The court rejected Woodforth's claim that the risk of injury to Moore was not reasonably foreseeable.[2]

President Mason confirmed that foreseeability of risk of injury to the plaintiff, or class of persons similarly situated, is crucial to the issue of a defendant's negligence. His Honour referred, with approval, to the High Court decision of *Tame v New South Wales; Annetts v Australian Stations Pty Ltd*.[3]

By making a comparison with motor vehicle accidents,[4] President Mason concluded that Woodforth, in travelling at 12 to 15 knots in an area where there were other water users, should have maintained a proper lookout. As the channel was a popular area for water activities, the risk of injury to Moore was not far-fetched or fanciful.

'The plaintiff was visible to a person standing in the defendant's boat at a point well in excess of the distance within which...[one] ought reasonably be expected to take simple evasive action.'[5]

Contributory negligence

Moore contended that his actions did not amount to a failure to take care for his own safety, and that 'duck-diving' under the vessel was 'a reasonable response to the agony of the moment in which he was placed'.[6] However, the court upheld the contributory negligence assessment after considering the following factors.

- Moore knew the area and that boats regularly used the navigational portion of the channel and that signs prohibited swimming in the area.
- He was swimming face down, which affected his capacity to see and hear approaching vessels.
- He did not have a companion to keep watch, or a divers flag or other clearly visible object to indicate his presence in the water.
- He was not brightly attired.[7]

It was irrelevant that spear fishing in the area was prohibited.[8]

Voluntary assumption of risk

In response to claims that Woodforth was not liable because Moore had chosen to expose himself to a risk of injury by swimming in the channel, President Mason confirmed that the onus was on the defendant to prove the following demanding standards of the *volenti* defence:

- The plaintiff knew the danger.
- He fully appreciated the risk of injury created.
- From an objective standpoint, he voluntarily agreed to accept the risk and its consequences.[9]

Here it had not been proved that Moore fully comprehended the extent of the risk and chose to accept or ignore it. The evidence only proved that he chose to spear fish in the channel, despite knowing that boats also used the area.

Damages assessment

The lost earning capacity component of Moore's damages assessment was increased from $120,704 to $160,938. The initial assessment had ignored the adverse effect on Moore's residual earning capacity of: ▶

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- His continuing physical and psychological disability caused by the accident; and
- The difficulty in locating suitable work for a man of his age, qualifications and background.[10] PL

Endnotes:

1 President Mason and Justices of Appeal Meagher and Heydon concurring.
2 at para 7.
3 (2002) 76 ALJR 1348.
4 at para 20.
5 at para 22.
6 at para 8.
7 at para 16, 44-45.
8 at para 39-42.
9 at para 30.
10 at para 108–110.

ELLEN VOGLER, QLD

Discrimination on the basis of pregnancy

Gardner v All Australian Netball Association Limited [2003] FMCA 8

Facts

Ms Gardner was an elite netballer and captain of the Adelaide Ravens. All Australia Netball Association (AANA) was the federal body organising the sport of netball in Australia. Its member organisations were state and territory organisations that controlled netball in their respective jurisdictions.

South Australia's member, South Australian Netball Association (SANA), had two teams in the national competition. These were made up of players from feeder teams.

Importantly, Ms Gardener was not and could not be a member of AANA or SANA. She was, however, a member of a feeder club in South Australia.

On 18 June 2001, AANA imposed an interim ban preventing pregnant women from playing. Ms Gardener was pregnant at the time the interim ban was imposed and as a result she missed three matches.

Ms Gardener complained to the Human Rights and Equal Opportunity Commission (HREOC), claiming she was discriminated against on the basis of pregnancy and that this breached the *Sex Discrimination Act* 1984 (Cth).

At the hearing, the respondent accepted that the interim ban had discriminated against the applicant on the basis of pregnancy, but claimed that the Act was exempt by virtue of section 39, which states:

'Nothing in Division 1 or 2 renders it unlawful for a voluntary body to discriminate against a person, on the grounds of the person's sex, marital status or pregnancy, in connection with:

- The admission of persons as members of the body; or
- The provision of benefits, facilities or services to members of the body.'

The respondent argued that membership in these circumstances could be viewed as a chain. The player was a member of a club, the club was a member of SANA, and SANA was a member of AANA, and hence the exemption was applicable.

Findings

Federal Magistrate Raphael accepted that the words 'in connection with' extended the meaning of both 'admission' and 'provision of benefits, facilities or service' to include the terms and conditions upon which admission and benefits were offered or refused.

The Magistrate did not accept that the words could be used to expand the definition of members.

He found that 'because of the awkward wording of the definition of "discrimination" and "indirect discrimination" there is already authority which has the effect of requiring complainants to carry out complex exercises in statistics in order to ascertain whether or not they have been treated less favourably than other persons.'

Regarding section 39, the Federal Magistrate held that: 'The clause offends against the now accepted proposition that discrimination in any shape or form is wrong. It does so in order to promote what has obviously been considered a higher purpose, namely freedom of association. If a voluntary organisation wishes to take advantage of this section then it is entitled to do so. But if it constitutes itself in a way which puts up a barrier towards it taking advantage, the courts should not come to its aid.'

Ms Gardener was not and could not be a member of either AANA or SANA, so the exemption was not available.

Accordingly, it was found that AANA discriminated against Ms Gardener by preventing her from playing and Ms Gardener was awarded $6,750 in agreed damages.

This case reaffirms the principle that exemptions in beneficial legislation, such as the various discrimination statutes, will be given a narrow interpretation. Practitioners should be cautious when interpreting exemptions in the discrimination statutes to ensure they reflect the precise wording of the exemption, and not an expanded interpretation, such as that argued by the respondent in this case. PL

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