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Case Alert

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Marsupial Miscalculation – obvious risk and the allocation of resources under the Civil Liability Act

***Kempsey Shire Council v Five Star Medical Centre Pty Ltd* [2018] NSWCA 308**

AT A GLANCE

- In February 2014, a landing aircraft collided with a kangaroo at Kempsey Aerodrome and was damaged. The owners of the aircraft, Five Star Medical Centre Pty Ltd, sued the owner of the airport, Kempsey Shire Council, in the District Court of NSW. The Court found the Council breached its duty of care by not issuing a notice of risk and not installing a kangaroo-proof fence.
- The Council appealed to the NSW Court of Appeal, which considered whether such a risk was an "obvious risk", carrying no duty to warn, and whether the Council could rely on section 42 Civil Liability Act 2002 (NSW) to avoid liability for not allocating resources to build a fence. The majority found for the Council.
- The decision is important for insurers as it confirms a broader ability for public authorities to rely on the s42 defence in negligence claims. The decision raises a possible distinction between a "failure to warn" and a "failure to provide information". If a case is determined to be one of "a failure to provide information", the principle of no duty to warn of an obvious risk will potentially not apply.

The facts

Five Star Medical Centre Pty Ltd owned an aircraft that, in the early afternoon of 25 February 2014, landed at Kempsey Aerodrome and collided with a kangaroo on the runway, causing damage to the aircraft.

Five Star commenced proceedings in the District Court of NSW against Kempsey Shire Council as the owner and controller of the aerodrome, alleging that the collision was caused by the Council's negligence and claiming the damage to the aircraft.

The trial judge found the Council breached its duty of care to users of the aerodrome by not:

- issuing a notice to pilots stating that kangaroo incursions onto the aerodrome had increased to dangerous levels, and
- erecting a kangaroo-proof fence around the aerodrome.

The Council then appealed the decision to the NSW Court of Appeal.

The Court of Appeal's decision

The Court allowed the appeal, with Simpson AJA dissenting, finding that the pilot (the "controlling mind" of Five Star) should have been, and was, aware of the obvious risk of colliding with a kangaroo on the runway and that, under s42 of the Civil Liability Act 2002 (NSW) (CLA), the Council did not have available resources to build a fence, "without reducing funds allocated to other purposes".

Obvious risk and duty to warn

The majority

Under the CLA, there is no duty to warn of an obvious risk, subject to some exceptions. The pilot's evidence stated that he would not have flown the aircraft had a notice to pilots been issued.

Here, Basten JA (with McColl JA concurring), found for the Council by deciding that the risk was obvious and, as such, did not require a notice to pilots.

In this decision, Basten JA provided some helpful commentary on the obvious risk and duty to warn provisions in CLA (ss 5F, 5G and 5H):

- Whether a risk is obvious is an objective test. The risk should be assessed at a reasonable level of generality.
- The concept of obvious risk removes the duty to warn another person of a risk (s5H).
- The effect of s5H(1) was to deny a duty to warn; it is not an assessment of the reasonableness of a warning actually given. To engage s5H, it was unnecessary to establish actual knowledge by Five Star.

Basten JA characterised the relevant risk as "the risk of an aircraft suffering damage through colliding with a kangaroo or other wildlife on the runway as the aircraft was landing or taking off" (at [14]). When the risk was characterised this way, Basten JA found Five Star (through the pilot) had actual knowledge of, and was aware of, the kangaroo hazard as the pilot had given evidence that he was aware of an entry that "kangaroo hazard exists" made in *En Route Supplement Australia* (ERSA), an online publication produced by Airservices Australia.

Basten JA rejected the trial judge's findings that:

- The risk was not obvious because:
    - the pilot had flown to Kempsey on 20 occasions and had never seen a kangaroo, or
    - the words in ERSA did not constitute sufficient warning of the degree of risk on the collision date.
- For the purpose of s5G(1), that Five Star was "not aware of the risk" on the collision date.

Basten JA was unconcerned that the pilot had not seen a kangaroo on 20 occasions, given the risk characterised.

His Honour found it implicit that the ERSA statement was inadequate regarding the level of the risk, but considered s5H, which denied a duty to warn, did not permit an assessment of the reasonableness of a warning.

Basten JA noted that, while the pilot may have been unaware there was a kangaroo on the aerodrome at the time he landed, the case was not run on the basis that the Council had a duty to warn on an hourly basis of the presence of one or more kangaroos on the aerodrome. The evidence also did not support a finding that there were increased numbers of kangaroos on the aerodrome at the time of the collision, which may have created a situation that fell outside the accepted obvious risk. His Honour found, on the evidence, it was not possible to conclude the level of risk that existed at the time of collision was beyond the obvious risk accepted by the pilot.

Dissent

There are exceptions to there being no duty to warn of an obvious risk. In this case, an exception may have existed if the pilot had requested advice or information about the risk from the Council. Basten JA found that while the information contained in ERSA was provided by the Council to Airservices Australia, the pilot had made a request for information to a third party, Airservices Australia, not to the Council.

In contrast, in her Honour's dissenting judgment, Simpson AJA interpreted s5H(2)(a) broadly and found that while the Airservices Australia website was operated by Airservices Australia, Airservices Australia depended on managers of aerodromes (including the Council) for the information it provided on the website. In consulting the website, the pilot was – "admittedly indirectly" – seeking advice and information from the Council. Thus, Her Honour found the exception existed and that there was a duty to warn of the risk.

Simpson AJA was also not satisfied that this was a failure to warn case. Her Honour was attracted to the distinction between a failure to warn case and a failure to provide information case and considered this was more properly a case in which the Council had information, assumed an obligation to provide information, but failed to maintain the information's currency. In forming this opinion, her Honour noted the brief way in which the Council, at first instance, dealt with the obvious risk / failure to warn arguments. The majority did not discuss this point.

Section 42

Section 42 of the CLA sets out principles regarding resources available to a public authority and a public authority's allocation of resources, which apply in determining whether a public authority both owed and breached its duty.

The Court was unconvinced Five Star had established that the Council ought to have erected a kangaroo-proof fence around the aerodrome. Basten JA gave the leading judgment (McColl JA concurred and Simpson AJA did not address section 42) on this issue. Section 42 relevantly provides:

> **42 Principles concerning resources, responsibilities etc of public or other authorities**
>
> The following principles apply in determining whether a public or other authority has a duty of care or has breached a duty of care in proceedings for civil liability to which this Part applies:
>
> (a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions,
>
> (b) the general allocation of those resources by the authority is not open to challenge,
>
> (c) the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate),
>
> (d) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.

On section 42(a), Basten JA considered that "functions required to be exercised by the authority" includes functions imposed by law and functions that the public authority deems necessary to provide services and carry out activities appropriate to the community's needs. Further, "functions" include all powers incidental to operating an aerodrome. Basten JA disagreed with the trial judge's findings that:

- The functions required to be exercised by the authority are limited to what is required at law. Operating on this basis, the trial judge considered s42(a) did not apply as there were no obligations in the legislation that "required" the Council to operate an aerodrome (although it was not doubted the Council had permissive powers to carry out activities appropriate to the community's needs).
- Functions were only limited to broadly defined functions.

Basten JA also found error with the trial judge's finding that s42(b) was not engaged. The trial judge considered "those resources" (in (b)) referred to the resources in para (a). But because (a) was not engaged, then the trial judge held (b) was not similarly engaged. Basten JA considered this was erroneous as, in its terms, para (a) merely identifies a source of relevant resources and that the non-engagement of s42(a) did not affect the engagement of s42(b).

Here, the Council relied on evidence that: it operated at a loss; there were other areas that required priority of funds ahead of the kangaroo fence; and the cost of erecting a fence was significant. In this case, Basten JA held that *"the Court should not find a breach of duty by failure to take a precaution in circumstances where a decision to take the precaution required an assessment of conflicting demands on the Council's budget"*.

Implications for insurers

This case highlights that, in a negligence claim, for a party to rely on a risk being an obvious risk (and the effects that flow from it) it must properly make the argument at first instance. In this matter, there were suggestions from the judges that the Council's submissions and arguments at the first instance were cursory, which appears to have caused some difficulty for the trial judge.

Care should also be taken when providing information to website providers. While the majority took a narrow approach in finding that the pilot's use of a website with information provided by a third party did not mean the pilot requested

information from the third party, there is some force in the minority judgment that the third party was the source of the information (making it immaterial that another entity operated the website).

Further, in a point picked up by the minority (but not addressed by the majority), there is some support for a difference between a "failure to warn" case and a "failure to provide information" case. If a case is determined to be one of "a failure to provide information", the principle of no duty to warn of an obvious risk might not apply.

This decision also provides comfort to public authorities as it found the functions that are the subject of the s42 defence includes both the powers required at law and incidental powers. This will help broaden the scope of functions available to public authorities to make the s42 defence.

Need to know more?

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