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Case Alert

Shaping the future of insurance law

Tragic jetty fall case tests many civil liability issues

Polglase v Coffs Harbour City Council (No 2) **[2019] NSWSC 1848**

20 DECEMBER 2019

AT A GLANCE

- On 19 December 2019 His Honour Justice Richard Cavanagh SC of the NSW Supreme Court gave judgment in *Polglase by his tutor Jeffery Polglase v Coffs Harbour City Council (No 2)* [2019] NSWSC 1848.
- Wotton + Kearney acted for the State of NSW in its successful defence of the proceedings.
- The case centred around a tragic accident in 2014 when a young child fell from a jetty while in the care of his grandparents. The case was complex and involving multiple defendants in varying capacities.
- The judgment touches on a smorgasbord of civil liability issues, including the negligence calculus (ss 5B-5D), risk warning and recreational activity (s5M), the peer professional opinion defence (s5O), and scope for duty for occupiers, designers and parents/guardians.

The facts

On 30 September 2011, the Claimant, who was then five years of age, sustained a brain injury when he fell through a railing on the Coffs Harbour jetty on to the hard sand more than five metres below (incident).

The jetty was constructed in 1892 and gazetted as a national work heritage item. It was then restored by the State Government in the 1990s after it had fallen into disrepair. The restoration was undertaken on the condition that the Coffs Harbour Council would take over care and control of the jetty.

Although the jetty was reopened to the public on 11 October 1997, the transfer to the Council was delayed, and only occurred in 2002. Between the date of reopening to the public in 1997 and the Claimant's accident there were other accidents and near-misses.

The Claimant sued:

- the State of NSW (State), on the basis that it designed and constructed a defective railing
- the Coffs Harbour Council (Council) and the Coffs Coast State Park Trust (Trust) as occupier of the jetty following the handover in 2002, and
- his grandparents, in whose care he was at the time he fell from the jetty.

The issues

The proceedings were complex and the issues including questions about:

- the nature and extent of the duty owed by the State arising out of the restoration of the jetty and any continuing responsibility it had regarding the jetty
- the nature and extent of any duty of care owed by the Council given the nature of the handover in 2002
- the existence of scope of any duty of care owed by the grandparents as guardians to the Claimant, and
- the application of various provisions of the *Civil Liability Act 2002* (NSW) (CLA), including the negligence calculus (ss 5B-5D), risk warning and recreational activity (s5M), the peer professional opinion defence (s5O), and the public authority defences (ss42 and 43A).

The findings

The ultimate result involved a verdict in favour of the Claimant against the Council and the Trust and a dismissal of the proceedings against the State and the grandparents.

Cavanagh J found:

- Before the handover in 2002, the State was the occupier of the jetty. Following the handover to the Council, the State had no control of the jetty was therefore no longer an occupier of the jetty. This was based on Cavanagh J's statutory interpretation of the legislation giving effect to the transfer.
- From the handover onwards (and as at the incident date), the Council was the occupier of the jetty. It therefore owed a duty of care to the Claimant.
- The risk of harm was the risk of a child falling through the rails onto the hard sand below. The Council was on notice of the relevant risk of harm and was negligent for not undertaking its own risk assessment in 2002. Had a risk assessment taken place then it would have been evident to the Council that the railing required modification, such as adding wire strands in the gaps or using infill in the gaps. Further, the Council's knowledge of an accident in 2007 – involving another young child who fell through the rail – should have indicated to the Council that it needed to take steps to make the rail safe.
- There was insufficient evidence to support the s42 CLA resources defence.
- As the State was not the occupier at the time of the incident, the case against the State was on negligent design. Cavanagh J held the State was not negligent in its design of the rails on the jetty as it accorded with common practice and the most relevant Australian Standard at the time.
- The State could not rely on its s5O defence as the relevant professional practice was not sufficiently identified.
- The grandparents were not negligent. Cavanagh J rejected the arguments that the grandparents taking the Claimant out to the jetty, allowing him to stand with them adjacent to the railing, and not holding his hand, were negligent actions.

Implications for insurers and government agencies

In establishing negligence, the evidentiary onus is on the Claimant. This judgment reinforces that the question of breach must be determined prospectively. At the time of the State's design (before 1997), it was consistent with a standard and common practice. Further, there was no evidence that the State was on notice of any safety issues with the design. In Cavanagh J's words, that was "hardly suggestive" of a failure to take care.

> **"There was no evidence that the State was on notice of any safety issues with the design.**

This case also highlights the danger of expert evidence that adopts a narrow focus without wider considerations. In this matter, Cavanagh J preferred the State's expert who considered the multi-factorial process of design, the heritage concerns with the railings and the involvement of other stakeholders.

In contrast, the Claimant's expert concluded the design was negligent simply because it was foreseeable that children would be on the jetty, which meant alternate design options should have been considered. Cavanagh J's considered that limited opinion was "lacking in supportive reasoning".

The case also provides guidance on appropriate warning signage. In rejecting the s5M defence – that there is no duty of care for a recreational activity where there is a risk warning – Cavanagh J considered the warning on the sign "Use of this facility may be hazardous" was "as general as possible".

To make out the s5M defence, signs must at least suggest there is a hazard or at least direct attention to a hazard. While the sign need not spell out the exact risk, there is a minimum threshold required to engage the s5M defence.

Additionally, this judgment highlights the difficulty of pursuing carers or guardians in a liability claim. The case involves a good summary of the key authorities regarding the duty owed, and a further illustration of the required latitude given to the actions of carers or guardians before negligence is established.

Finally, in a s5O defence, the evidentiary onus is on the defendant. It is important that the evidence addresses that particular (and identified) professional practice, not simply a general practice. A defendant must establish that the particular professional practice was widely accepted in Australia by peer professional opinion as competent professional practice.

This matter confirms it is insufficient to simply rely on evidence on the overall process as that will not satisfy the terms of s5O.

Need to know more?

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