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Case Alert

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# Court of Appeal confirms Polglase decision and the critical question of breach

***Coffs Harbour City Council v Polglase*** **[2020] NSWCA 265**

27 OCTOBER 2020

**AT A GLANCE**

- On 23 October 2020, the Court of Appeal handed down its judgment in *Coffs Harbour City Council v Polglase* [2020] NSWCA 265.
- The Court upheld the primary judge's decision and found the State of NSW and the injured child's grandparents were not liable.
- The case confirms, for the purpose of a duty of care on a statutory authority, what matters is control and management rather than ownership or occupation.
- The case also re-affirms there is a minimum threshold for warning signs to engage the s.5M defence.
- Wotton + Kearney acted for the State of NSW in its successful defence of the appeal proceedings.

## 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 (the incident).

The jetty was constructed in 1892 and gazetted as a national work heritage item. It was then restored by the NSW State Government (the State) 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 incident there were other accidents and near-misses. They included:

- an accident on the opening weekend of the jetty in 1997
- a 'near miss' or 'near accident' in 1999
- an accident in 2007 in which a two year old child fractured his skull, and
- the incident in 2011.

The Claimant sued:

- the State, on the basis that it designed and constructed a defective railing, and had occupied the jetty
- 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 Appeal

In the first instance, 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.

The Council and the Trust appealed the first instance decision. The Claimant cross-appealed the first instance decision on order of costs (which did not directly involve the State).

Leeming JA provided the leading judgment, with Basten JA and Macfarlan JA concurring. The issues on appeal were whether:

- the Council or the Trust breached a duty of care owed by reason of occupation and control of the jetty, by failing to install additional railings or a mesh infill to prevent young children from falling from the jetty
- the risk warning placed at the jetty's entrance meant that no duty of care was owed to the plaintiff, by virtue of s 5M of the *Civil Liability Act 2002* (NSW)

> **For the purpose of a duty of care on a statutory authority, what matters is actual or de facto control and management, rather than ownership or occupation.**

- the State was liable to the Claimant given its role in restoring the jetty and as a former occupier, and
- the grandparents were liable to the Claimant.

### *The Council's and the Trust's liability*

The Council accepted that it owed a duty to the Claimant but challenged the finding of breach.

Leeming JA characterised the risk of harm as being a young child who may fall from the jetty, with no intention to do so. Leeming JA found a reasonable person, in the Council's position, and knowing the actual and potential injuries suffered by young children before 2011, would have taken steps to install additional strands of wire or a mesh infill to prevent the incident. He found a reasonable person in the Council's position would have done so by no later than 2007, following the third accident.

The Council relied on the risk warning defence, under s.5M of the *Civil Liability Act* 2002 (NSW), to argue it did not owe a duty. Section 5M(5) sets out the risk warning need not be specific to the particular risk and can be a general risk warning of risks that include the particular risk concerned.


The sign included the words: "USE OF THIS FACILITY MAY BE HAZARDOUS PLEASE BE CAREFUL". However, Leeming JA held the sign, when read as a whole, did not warn of the general risk in this case. The sign was directed to the risk of diving from the jetty into water that had varying depth due to the tide. Nothing in the sign alerted a reader to the risk of a young child falling through the railing on to the hard sand below.

### *The State*

The Council submitted, in the alternative, that if it was liable to the plaintiff, then the State was also liable on the bases that it:

- was negligent in its design and construction of the railing
- remained the occupier and in control of the jetty between 1997 and handover in 2002, and
- remained the occupier/owner of the jetty on the date of the incident.

The essence of the Council's appeal was that there was an error in failing to deal with a case based on the design and former occupier factors together. Leeming JA agreed with the State's submission that the blended case was a new case on appeal, and one that was not developed in any detail or any prominence at trial.

Leeming JA also found issues with the Council's submission on its merits. While not ruling out that former occupiers could owe a duty to plaintiffs, the issue did not arise in this case. The critical question here was breach. Leeming JA did not consider a reasonable person in the State's position, with knowledge of the accident on the opening of the jetty in 1997 or the near-accident in 1999, would have taken any further precautions. Leeming JA also stressed there were no actual instances of serious harm from the railing in the period the State was in occupation.

> **"This case also re-affirms there is a minimum threshold for signs to engage the s.5M defence, and that signs must at least suggest there is a hazard or direct attention to a hazard.**

*The grandparents*

Leeming JA considered the primary judge was correct to find the grandparents were not negligent, as a reasonable person in their position would not have necessarily firmly held the Claimant's hand or ensured it was impossible for him to suddenly approach and pass through the railing. Leeming JA reaffirmed orthodox judicial technique that a primary judge can, if duty is problematic, make no finding on duty but instead make a finding there was no breach.

## Implications for insurers

Leeming JA provides useful analysis on the interaction of a duty of care and Crown land in NSW. In this case, the reservation of Crown land and the creation of a reserve trust, did not cause the land to cease to be Crown land. In other words, post-handover in 2002, the jetty continued to be on Crown land.

For the purpose of a duty of care on a statutory authority, what matters is actual or de facto control and management, rather than ownership or occupation. Leeming JA found the State had actual control between 1997 and 2002. After 2002, the Trust was charged with the care, control and management of the jetty, and the affairs of the Trust were managed by the Council.

This case also re-affirms there is a minimum threshold for signs to engage the s.5M defence, and that signs must at least suggest there is a hazard or direct attention to a hazard.

The Council argued that there was a tension between the State's non-response and the Council's non-response (to take precautions for the jetty such as wires or mesh-infills), when only the Council's non-response resulted in a negligence finding. However, the finding was that the reasonable response in 2002 (by the State) may be different to what the reasonable response was in 2007 (by the Council).

Similarly, the Council relied on a letter it received from the State in 2002 suggesting that the railing complied with the standards, as justification that the Council need not to take any further precautions. Leeming JA noted that standards change from time to time, and that the standard may inform – but cannot dictate – the standard of reasonable care in any particular case. Further, a reasonable response may vary over time, depending on the known history of the site.

Insurers will need to consider all circumstances, including the known history of the incident area, in determining whether its insured should have taken further or other precautions. A position may not be justified just because another party did not take precautions at a different point in time.

## Need to know more?

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