CASE notes

ANNE MATTHEW, QUEENSLAND

Reasonable care en route

Derrick v Cheung (unreported) High Court 9 August 2001

Shortly before Christmas 1994, a toddler was hit on a busy road not far from a shopping precinct. The car was travelling at least 10-15 kilometres below the speed limit. The evidence was clear: The child moved suddenly from the footpath, darting between parked cars, into the path of the oncoming traffic.

In the District Court of New South Wales

On the facts, the only possible basis for any finding of negligence was speed.[1] The Court accepted that, although the vehicle was travelling well within the speed limit, the speed of 45-50 kilometres per hour was excessive because, "at that speed it was beyond the power of the motorist to stop in time if a child suddenly appeared from in front of one of the parked cars".[2]

Chesterman ADCJ considered that on a Saturday morning at that particular time of year, the driver should have been alerted to children, particularly given the proximity of the road to local homes and shops. In finding that the driver had been negligent, his Honour noted that the collision could have been avoided if the driver had been travelling at a slightly slower speed.

In the Court of Appeal of New South Wales

The appeal was dismissed in the Court of Appeal (Stein and Fitzgerald JJA, Davies AJA dissenting). The majority acknowledged that driving at the speed limit and in a manner appropriate to the flow of the traffic would usually be reasonable, but found no reason to intervene with the decision at first instance.

In dissent, Davies AJA focused on whether a "reasonably careful motorist" should anticipate the "irrational behaviour of pedestrians".[3] His Honour found that the appellant was driving "at a reasonable speed and in a responsible manner"[4], "keeping an appropriate distance between her vehicle and the vehicle in front and keeping a proper lookout"[5]. The child shouldn't have been on the road and was not visible from the road. His Honour found that it was not reasonably foreseeable that such a child would attempt to cross the road unattended. Accordingly, the driver had not breached any duty of care.

The Decision of the High Court

The High Court (Gleeson CJ, Gaudron, Kirby, Hayne and Callinan JJ) unanimously upheld the appeal deciding that there was no basis for a finding of negligence. Their Honours, in a joint judgement, favoured the reasoning of Davies AJA who had drawn a distinction between "quiet suburban streets where children might be playing"[6] and the busy road where the accident occurred. Further, as the appellant had submitted, the road was not near a school or a bus stop. Their Honours considered the case to be tragic, but emphasised the importance of nevertheless determining the issues according to law.

Their Honours decided that to suggest that the accident could have been avoided by driving at a slower speed was a mere speculation, which did not, of itself, give rise to a finding

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of negligence. The driver had exercised reasonable care.

"Few occurrences in human affairs, in retrospect, can be said to have been, in absolute terms, inevitable. Different conduct on the part of those involved in them almost always would have produced a different result. But the possibility of a different result is not the issue and does not represent the proper test for negligence. That test remains whether the plaintiff has proved that the defendant, who owed a duty of care, has not acted in accordance with reasonable care."[7] PL

Footnotes:

1. See [1999] NSWCA 341 at [13].
2. [2001] HCA 48 at [8].
3. [1999] NSWCA 341 at [17] citing *Stewart v Carnell* (1984) 2 MVR 147 at 151.
4. [1999] NSWCA 341 at [18].
5. Ibid at [16].
6. Ibid at [14].
7. [2001] HCA 48 at [13].

Landmark Cerebral Palsy Judgment

Simpson v Diamond & Anor [2001] NSWSC 925 (5 November 2001)

Whealy J has awarded the plaintiff, a 22-year-old woman severely disabled by athetoid cerebral palsy since birth, almost $13 million in damages.

Dr Diamond, the mother's obstetrician, admitted liability on the eve of the trial and unsuccessfully pursued a cross-claim against St Margaret's Private Hospital.

The trial proceeded over 65 days and involved a full hearing of the obstetric issues. On the damages case the plaintiff's life expectancy was a crucial issue, which developed into a battle between the clinicians and the statisticians.

His Honour found from his overall assessment of the clinical material in relation to the "statistical starting point" that the plaintiff's probable span of remaining years was a further 51 years from age 22.

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Insurers could have settled for less

Janet Fife-Yeomans

DOCTORS' insurers could have settled the country's two biggest medical damages payouts for millions of dollars less if they had accepted settlement offers, it was revealed yesterday.

The nation's largest medical insurer, United Medical Protection, and the Australian Medical Association have warned that obstetricians could become uninsurable as a result of the record medical damages award of at least $13 million to cerebral palsy victim Calandre Simpson, 22.

The Australian understands a settlement offer of closer to $10 million had been rejected by UMP.

The case began in 1987, but it was not until the eve of the trial in March this year that UMP admitted liability on behalf of obstetrician Robert Diamond, who left Ms Simpson severely disabled through a botched forceps delivery.

Ms Simpson

Interest of about $2 million and legal costs of at least $1 million will be decided on Friday in the NSW Supreme Court. The second-highest payout, to Tom Lipovac, 23, who was left with brain damage after a mistake by his doctor, was $7.58 million in the ACT Supreme Court in 1998. Mr Lipovac's lawyers had offered to settle out of court four years earlier for $2.2 million, but the doctor involved denied liability.

Medical ethicist Merrilyn Walton said the cases highlighted why hospitals and professional associations should work towards a mediation system whereby the patient and doctor were not enemies.

Doctors should be encouraged to be honest about mistakes and patients should be quickly compensated, said Ms Walton, associate professor of ethical practice at Sydney University's faculty of medicine and the former NSW Health Care Complaints commissioner. She said a US veterans hospital had shown such a risk-management policy worked after introducing it in 1987. "Their liability costs have dropped from being one of the high-risk hospitals to a very low risk," Ms Walton said.

Australian Plaintiff Lawyers Association national president Rob Davis said insurers typically waited until the last minute to admit liability or agreed to settle as a tactical manoeuvre. He said their conduct should be scrutinised by the courts.

AMA vice-president Trevor Mudge said society, not insurers, should pay for victims such as Ms Simpson.

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