CASE notes

TINA COCKBURN, QLD

Liability in negligence for failure to warn

Hoyts Pty Ltd v Burns [2003] HCA 61

In *Hoyts Pty Ltd v Burns*, the High Court allowed an appeal (with costs) by the appellant, Hoyts Pty Ltd. The appeal was from the New South Wales Court of Appeal, which had substituted its opinion as to the effect of a warning sign for that reached by the primary judge, in circumstances where there had been an adverse finding as to the credibility of the respondent's evidence on that issue.

Kirby J, though agreeing with the orders proposed in the joint reasons, delivered a separate judgment. His Honour proposed that the determination as to whether a warning is required necessitates an evaluation of the social considerations that the law is seeking to advance, including accident prevention and respect for individual autonomy based upon fundamental human rights and human dignity. Kirby J said:[1]

'To decide whether in a particular case a notice is required, it is necessary to take into account the social considerations that the law is seeking to advance. From the point of view of the occupier, it is seeking to encourage attention to, and consideration of, accident prevention by the party ordinarily with the superior means and interest to keep abreast of publicly available or expert knowledge concerning the risks of injury in such activities. From the point of view of the entrant, the law is seeking to uphold that person's entitlement to make informed choices concerning the kind of risks in which they will participate on the basis of knowledge provided by the occupier. At the heart of the latter objective lies a conception of respect for individual autonomy that probably has its source in notions of fundamental human rights and human dignity.'

THE FACTS

The respondent attended the appellant's cinema while working as a teacher's aide caring for a four-year-old disabled boy. She got up to try to control the child, who became agitated when the movie started, and was screaming and kicking. She suffered injuries when she attempted to sit down, as her seat, which had automatically retracted, had not been pushed down.

She commenced proceedings in the New South Wales District Court, claiming damages for injuries suffered as a consequence of the appellant's alleged negligence.

THE FINDINGS AND DECISION OF THE PRIMARY JUDGE

The primary judge considered that there was no breach of duty by the respondent either by providing a seat of negligent design or by failing to warn of the dangers of injury from seats retracting automatically when not under pressure.

Her Honour considered that the seats were not inherently dangerous because they retracted automatically or because they were fitted with a protruding pedestal support structure. In any event, the cause of the respondent's injury was her miscalculation as to the position of the seat. She was satisfied that a warning would have made the respondent aware that the seats retracted automatically when not under pressure. However, Her Honour considered that although personally honest, the respondent was an unreliable witness, whose evidence was to be treated with caution, and concluded that a warning would not have changed the respondent's course of conduct.

THE COURT OF APPEAL DECISION[2]

The respondent appealed to the New South Wales Court of Appeal. Although she persisted with her claim based on the alleged design defect, the court confined itself to a consideration of the need or otherwise for a warning, and its efficacy had it been given.

Sheller JA[3] considered that a reasonable person conducting a cinema with automatically retractable seats would foresee a risk of injury to persons returning to seats in the dark. Although the chance of injury occurring was slight, the risk of injury if it did occur was substantial.[4] Therefore, a sign, 'Take care. Seats retract automatically. Ensure your seat is down before you sit', should have been displayed in the foyer.[5]

Furthermore, Sheller JA considered that despite the primary judge's rejection ▶

Tina Cockburn is a Lecturer in the Faculty of Law at the Queensland University of Technology. **PHONE** 07 3864 2707
EMAIL t.cockburn@qut.edu.au

of the respondent's evidence, there was 'an overwhelming inference' that a person so warned 'would have included that added knowledge in the thinking processes in play when returning to the seat and would have taken care to ensure that the seat was down before sitting'.[6] This was not a case in which the 'impetuous nature of the respondent's conduct was such that it was unlikely that a mere sign would have deflected her from putting the seat down before she sat'.[7] Judgement was entered for the respondent.

THE HIGH COURT APPEAL

The appellant appealed to the High Court, contending that the Court of Appeal had erred in its appellate functions by substituting an inference that the posited warning would have caused the respondent to avoid the injury, contrary to the primary judge's findings of fact and credibility.[8]

THE JOINT JUDGMENT

McHugh, Gummow, Hayne and Callinan JJ delivered a joint judgment, finding that there was no basis for intervention by the Court of Appeal. The appeal was upheld for the following reasons:[9]

- The trial judge's findings were based not only on a general impression of the respondent, but also on specific instances of unreliability, albeit not conscious dishonesty.[10]
- Though not decisive, the Court of Appeal did not sufficiently regard that the respondent gave evidence as to what she would have done had there been a warning sign, 'as an afterthought, at the close of the appellant's case'.[11]
- It could not be regarded as likely, let alone 'an overwhelming inference', that a sign would have been read or acted upon.[12]
- In any event, the 'overwhelming inference' was drawn in respect of a generality of persons, rather than the relevant person, the respondent (in respect of whom the primary judge had made specific observations and comments), and it took no account of the particular circumstances.[13]
- Most importantly, there was no proper regard to the fact that the respondent was so distracted by the child that she was unlikely to have acted with deliberation and conscious awareness of a warning sign, rather than impulsively.[14]

JUSTICE KIRBY

Kirby J noted that the High Court does not conduct an appeal by way of rehearing requiring assessments of credibility of witnesses, but rather considers how the primary judge came to his or her conclusion and how the Court of Appeal felt authorised to reverse it.[15] The High Court's role is to 'give such judgment as ought to have been given in the first instance'.[16]

In this case, the credibility findings did not prevent the High Court from exercising its appellate functions.[17] Kirby J said:[18]

'In each case it is necessary to analyse the role, if any, that credibility has actually played in the critical findings of the primary judge. The mere mention of credibility by the primary judge does not slam the door to effective appellate review of factual findings. It did not do so in this case.'

In respect of drawing inferences about what the plaintiff would have done and evaluating those circumstances, as opposed to assessing whether she was telling the truth, the Court of Appeal was, generally speaking, in as good a position to reach its own conclusions as was the primary judge.[19]

Assuming that the provision of a warning was appropriate, it was necessary to determine whether this would have prevented the respondent's injuries. Given the findings that the respondent was distracted and that her movement in seating herself was not a deliberate, conscious one, it was open to the primary judge to conclude that a warning would not have altered the respondent's conduct in the circumstances.[20]

When will there be a duty to warn?

As a warning would have made no difference in this case, it was unnecessary to decide whether the appellant's duty of care required it to provide a warning sign.[21] Nevertheless, Kirby J pointed out the dangers of taking his comment in *Romeo v Conservation Commission (NT)*[22] 'out of context and viewing it as a universal proposition of law'[23] instead of evaluating 'the suggested need for, and effectiveness of, a warning by reference to the proved circumstance' on a case-by-case basis.[24]

In *Romeo*, Kirby J had said:[25] 'Where a risk is obvious to a person exercising reasonable care for his or her own safety, the notion that the occupier must warn the entrant about that risk is neither reasonable nor just.'

In *Burns v Hoyts*, Kirby J said:[26] 'It would be a mistake to infer from *Romeo* and *Woods* that the provision of warnings by occupiers to entrants upon their premises is no longer part of the law. *Nagle* clearly holds to the contrary. Common sense and frequent experience confirm that notices can be important means of accident prevention.'

His Honour identified the following as some considerations relevant to whether a warning is required:[27]

- whether the occupier has an economic or other interest in the entry of the plaintiff;
- whether, because of previous incidents, public discussion or otherwise, the occupier could be expected to know of any particular risks against which warnings should be given;
- whether there was any hidden feature of the place or activity that might not be plain to an ordinary entrant but which should be known to, or reasonably discoverable by the occupier, calling for a warning;
- whether, if the risk eventuated, the consequences would be likely to be minor or significant for the person affected;
- whether the imposition of a requirement to give a notice could be

confined to a particular place or places or would have large implications, costs and other consequences; and

- whether the nature of the activity in question was such as to render the presence of a sign irrelevant to the actual prevention of injury.

Scope of duty owed to contractual entrants

As the respondent was an entrant on the appellant's premises pursuant to a contract negotiated for reward, Kirby J said that a higher standard of care (though 'not a duty of insurance against any risk of injury'[28]) was owed to ensure that 'the premises are as safe for [the mutually contemplated] purpose as reasonable care and skill on the part of any one can make them'.[29]

His Honour commented that the Court of Appeal adopted a different formulation of the scope of the duty, defining it in terms of the general principles of negligence. He noted that no notice of contention was filed raising this point, asserting a larger duty of care or seeking to revive the case at trial based upon the design defects of the cinema seat with its protruding pedestal.[30]

COMMENT

The Review of the Law of Negligence Report chaired by Justice Ipp made specific comments in relation to obvious risks and whether warnings are required.[31] Legislative changes have now been introduced.[32] Subject to specified exceptions, there is no duty to warn of obvious risks.[33] Recently, in *Gosford City Council v Needs*,[34] Ipp J affirmed that whether a risk is obvious is to be judged according to a reasonable person in the position of the plaintiff, holding that the trial judge was entitled to accept the plaintiff's evidence that a risk was not obvious to her, even if it was quite obvious in photographs afterwards.[35]

In failure to warn cases the considerations identified by Kirby J will be of assistance to the courts in the application of the new legislative provisions, as these provisions only set out general principles relating to the standard of care and do not contain an exhaustive list of relevant considerations.[36]

Specific rather than general evidence should be led as to how and where a warning should have been given and the form it might have taken. For example, in *Burns v Hoyts*, Kirby J said:[37]

'[T]here was no real elaboration of what any such sign would say; where it would be displayed to ensure it was noticed; and whether it would be screened in the cinema and if so whether, by that stage, any such warning sign would be too late because, by definition, most patrons would already be seated and those not distracted would already probably have noticed the design feature that led to automatic ▶

retraction of the seats when not in use. All such issues were left in a state of generality. No evidence was tendered to indicate that any such signs were displayed in other cinemas, theatres or public venues where retractable seats have long existed.'

Where the plaintiff is a contractual entrant the higher duty to ensure that 'the premises are as safe for [the mutually contemplated] purpose as reasonable care and skill on the part of any one can make them'[38] should be pleaded.

The relevant test of causation in failure to warn cases is a subjective one.[39] In *Chappel v Hart*,[40] McHugh J said:[41]

'[G]iven that most plaintiffs will genuinely believe that they would have taken another option, if presented to them, the reliability of their evidence can only be determined by reference to objective factors, particularly the attitude and conduct of the plaintiff at or about the time when the breach of duty occurred.

Following on from this, Kirby J noted in *Hoyts Pty Ltd v Burns* that 'evidence' of what a claimant would have done if a non-existent warning had been given by a hypothetical sign is so hypothetical, self-serving and speculative as to deserve little (if any) weight, at least in most circumstances.[42]

Legislative change goes further. In New South Wales, section 5D(3)(b) of the *Civil Liability Act* 2002 (NSW) says:

'Any statement made by the person after suffering the harm about what he or she would have done is admissible except to the extent (if any) that the statement is against his or her interest.'[43]

Now that the plaintiff's own evidence is inadmissible, it seems that it will be necessary to lead objective evidence and make submissions as to what a reasonable person in the position of the plaintiff would have done in the circumstances.[44] PL

Endnotes: **1** at [70]. **2** *Burns v Hoyts Pty Ltd* [2002] Aust Torts Rep 81637. **3** Heydon JA and Ipp AJA agreed. **4** at 68, 347 [20]. **5** at [22]. **6** at [23]. **7** ibid. **8** *Hoyts Pty Ltd v Burns* [2003] HCA 61 at [20]. **9** at [21]; [29]. **10** at [22]. **11** at [23]. **12** at [24]. **13** at [25]. **14** at [26]. **15** at [50], citing *Fox v Percy* (2003) 77 ALJR 989 at 996 [32]. **16** at [60], citing s 37 *Judiciary Act* 1903 (Cth). **17** at [58]. **18** at [59]. **19** at [56]. **20** at [74]-[75]. **21** at [76]. **22** (1998) 192 CLR 431. **23** at [67], referring to *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460. **24** ibid. **25** (1998) 192 CLR 431 at 478 [123]. **26** at [76]. **27** at [71]. **28** at [33]. **29** at [32], citing *Maclenan v Segar* [1917] 2 KB 325 at 332-333, *Watson v George* (1953) 89 CLR 409 at 424, cf *Jones v Bartlett* (2000) 205 CLR 166 at 196 [106], *Colin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 at 38. **30** at [46]. **31** http://revofneg.treasury.gov.au/content/home.asp, recommendation 14, para 4.26-4.34. **32** See for example ss 5F-5G *Civil Liability Act* 2002 (NSW); ss 13-14 *Civil Liability Act* 2003 (Qld). **33** s5H *Civil Liability Act* 2002 (NSW); s 14 *Civil Liability Act* 2003 (Qld). **34** [2003] NSWCA 144; discussed T Cockburn, 'Council Liable For Trip and Fall Where Knowledge and Risk Not Obvious' (2003) 59 *Plaintiff* 44-45. **35** at [13]; see s 5F(1) *Civil Liability Act* 2002 (NSW); s 13(1) *Civil Liability Act* 2003 (Qld). **36** Ss 5B-5C *Civil Liability Act* 2002 NSW; ss 9-10 *Civil Liability Act* 2003 (Qld). **37** at [39]. **38** *Colin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 at 38. **39** Kirby J at [54] and see fn 47; s 5D(3)(a) *Civil Liability Act* 2002 (NSW); s 11(3)(a) *Civil Liability Act* 2003 (Qld). **40** (1998) 195 CLR 232. **41** at 246, fn 64. **42** [2003] HCA 61 at [54], [57]; see also joint judgment at [23]. **43** see also s 11(3)(b) *Civil Liability Act* 2003 (Qld). **44** W Madden, 'Medical Negligence and the Ipp Reforms', paper presented at APLA National Conference, October 2003; *Hoyts Pty Ltd v Burns* [2003] HCA 61 at [28], see generally at [54]-[57].