2009

NSW Court of Appeal: Is public liability created under OH&S legislation?

Neil J Foster

AUSTRALIAN civil liability

NSW Court of Appeal: Is public liability created under OH&S legislation?

Judgment date: 16 June 2009

Wynn Tresidder Management Pty Ltd v Barkho [2009] NSWCA 149; BC200905074

The decision of the NSW Court of Appeal in *Wynn Tresidder Management Pty Ltd v Barkho* (*Wynn Tresidder*) deals with the question whether civil liability to a member of the public injured at a workplace can be based on the occupational health and safety legislation in NSW.

The plaintiff was attempting to enter a shopping centre car park, when she was injured as she slipped on a wet surface which had been created by rain entering where renovations were happening. Her claim in negligence against the owners of the shopping centre (the occupiers) succeeded at trial and was upheld by the Court of Appeal. But a claim in breach of statutory duty (BSD), which also succeeded at trial, was doubted by the appeal court. This casenote comments on the BSD claim, and some aspects of the interesting interaction of the tort of breach of statutory duty with the new civil liability legislation.[1]

The claim was based on civil liability created by the Occupational Health and Safety Regulation 2001 (NSW) (OH&S Reg). While it has been a topic that seemed to "fall off the radar" of many practitioners for some years (perhaps because for some time it was assumed that the "portmanteau" tort of negligence would be able to do it all), the tort action for breach of statutory duty has a long and respected history, especially in relation to workplace safety legislation.

There are some important issues arising in workplace BSD claims under the "new" (risk management) style of OH&S legislation (in both Australia and the UK)[2] but to sum up the route to civil liability here briefly:

(1) The Occupational Health and Safety Act 2000 (NSW) (OH&S Act) is the head legislation. It provides in s 32(1) that a breach of the "general duties" under the OH&S Act (which includes under s 8(2) duties owed by an employer to non-employees at the place of work, and under s 10 duties owed by those in control of workplaces) is not civilly actionable.

(2) But s 32(2) of the OH&S Act explicitly preserves the possibility that the **regulations** under the Act may create such liability.

(3) And it is submitted that s 39A of the OH&S Act clearly confirms this:

> **39A Civil liability under regulations**
> The regulations may provide that nothing in a specified provision or provisions of the regulations is to be construed:
> (a) as conferring a right of action in any civil proceedings in respect of any contravention, whether by act or omission, of the provision or provisions, or
> (b) as conferring a defence to an action in any civil proceedings or as otherwise affecting a right of action in any civil proceedings, but the failure of the regulations to so provide in respect of a provision is not to be construed as conferring such a right of action or defence.

This is a fairly straightforward provision given the fact that it is well established at common law that industrial safety legislation is usually civilly actionable (see *O'Connor v SP Bray Ltd*[3]). All it does is to specifically empower the regulations to exclude actionability from particular areas, against that background.[4] It is hence unusual to find McColl JA in *Wynn Tresidder* (who delivered the main judgement) at [82] calling s 39A of the OH&S Act "curious" and suggesting that it (rather than the general subject matter and history of the legislation) "confers an implied power" to make an actionable regulation. With respect, this is clearly incorrect. What confers a power to enact regulations which are civilly actionable is the enactment by the Parliament of workplace safety laws against a common law background which assumes that such laws are actionable unless specifically stated not to be.[5]

Here the provisions of the OH&S Reg relied on were cll 34 and 36, which impose obligations on the "controller of premises" to identify risks and eliminate or reduce them. Probably the most directly relevant[6] was cl 36:

36 Controller of premises to eliminate or control risks

(1) A controller of premises must eliminate any risk, arising from the premises, to the health or safety of any person accessing, using or egressing from the premises.

(2) If it is not reasonably practicable to eliminate the risk, the controller of the premises must control the risk.

(3) A controller of premises must ensure that all measures (including procedures and equipment) that are adopted to eliminate or control risks to health or safety are properly used and maintained.

McColl JA made a number of comments where she expressed doubt that these provisions could be used for a civil action by someone who was not an "employee", but was rather a member of the public like Ms Barkho. Her Honour commented at [91]:

> It seems prima facie improbable that legislation whose object is to secure the health, safety and welfare of persons at work would extend to provide a private cause of action to members of the public.

With respect, her Honour's comments are far from persuasive on this point. Whatever view might have been taken of the scope of older, "Factory Acts" legislation, it really seems beyond argument that the OH&S Act and the OH&S Reg do impose obligations to look out for the safety of members of the public who are present at a workplace. As her Honour conceded at [94], the wording of the regulations ("any person") is more than adequate to cover members of the public; clearly the car park was a "place of work" as a cleaner, Mr Nagem, was working trying to soak up some of the water on the spot where Ms Barkho fell.

Her Honour at [92] refers to the Second Reading Speech made when the OH&S Act was being considered in Parliament, finding no intention to protect members of the general public. But no mention is made of the far more persuasive fact of the legislative enactment[7] of an "Objects" clause, which in s 3(b) explicitly refers to one of the objects of the OH&S Act being "to protect people at a place of work against risks to health or safety arising out of the activities of persons at work".[8]

At [95], however, McColl JA indicates that "substantial policy reasons" favour the exclusion of members of the public from enjoying an ability to sue under the regulations. What are these policy reasons that would seem to over-ride the clear words of the legislation? The reasons identified amount to the fact that the NSW Parliament has restricted the ability of "members of the public" generally to take civil actions for negligence; that arguably since BSD claims are often "absolute" (not involving proof of carelessness), Pt 1A of the Civil Liability Act 2002 (NSW) (CLA) would not apply to such claims (a proposition which seems correct); and hence that because members of the public injured in workplaces would be better off than those injured elsewhere, Parliament cannot have intended this result. Indeed, there is even the odd suggestion at [98] that the CLA has somehow "impliedly repealed" the parts of the OH&S Reg which would allow such action.

Her Honour's suggestion of "policy" reasons for excluding what seems to be clear civil liability are not persuasive. Even if it be accepted for the moment that a judicial perspective on policy can be used to over-ride the clear implications of legislation, it must be queried whether these outcomes are bad public policy. Her Honour puts the point nicely when she notes at [97] that the view of the legislation adopted by the trial judge here would lead to the result that "members of the public in [the plaintiff's] position who are injured on premises which are both places where people work and places to which members of the public have access, may be in a substantially better position than [other] members of the public". Given the clear fact that workplaces create known hazards relating to, among other things, the pressures put on employees to complete tasks, which may lead to their not being alert to dangers to others, it surely is reasonable for the NSW Parliament to conclude that not only fellow workers, but also members of the public whose business brings them into proximity with workers, should receive some protection from those hazards. There is no doubt at all that this protection is applied in the operation of the criminal law;[9] why might Parliament not also be at liberty to conclude that a concurrent civil liability will reinforce the incentive given to those in charge of workplaces to put in place proper guards against the risks created by workplace activity?[10]

The more important consideration, of course, is that it does not seem right that a judicial view of the requirements of general policy, while of course it may inform the interpretation of legislation where there is ambiguity, should be able to curtail a liability which seems to be explicitly assumed by Parliament (for example, by the fact that s 39A of the OH&S Act was seen to be necessary to allow selective exclusion of civil liability from particular parts of the Regulation.) If the policy arguments noted in her Honour's judgment are valid, then it is surely up to the NSW Government to act by invoking the provisions of s 39A and itself excluding civil liability if it sees fit.[11]

A final reason proffered by McColl JA for excluding the liability for harm to members of the public is found in the decision in *Booksan Pty Ltd v Wehbe*[12] (*Booksan*) that the doctrine of contributory negligence applies to BSD claims. With respect, this last reason is also untenable. *Booksan* was a very specific decision exploring the precise terms of a number of pieces of legislation. But her Honour seems to suggest that it implies

some sort of general policy that where a case is "in substance, a claim for damages for harm resulting from negligence", then the same rules as those applicable to negligence claims ought to apply. The reasoning in the *Booksan* decision does not support this claim.[13]

In short, the arguments offered in *Wynn Tresidder* against the availability of a civil action to members of the public based on the provisions of the OH&S Reg are highly unpersuasive. The long history of the BSD action for workplace injury shows that it has often been available where negligence might not be, and subject to different rules. There seems no real doubt that the operation of the relevant provisions of the Act and regulations protects members of the public.

Indeed at [101] McColl JA acknowledges that her remarks on the BSD action are *obiter*, in that the claim in the tort of negligence had succeeded.[14] It may be hoped that this Note can be seen as a response to her Honour's invitation for "further consideration" to be given to these matters. It is suggested that with full argument on the matter a properly guided court would see the issues differently.[15]

Neil Foster
<Neil.Foster@newcastle.edu.au>,
Senior Lecturer, Newcastle Law School,
University of Newcastle, NSW

Footnotes

1. For a general overview of the tort in the UK see the important monograph by K M Stanton, *Breach of Statutory Duty in Tort* (Modern Legal Studies, Sweet & Maxwell, London 1986) at 2, updated more recently in K M Stanton, P Skidmore, M Harris & J Wright *Statutory Torts* (Sweet & Maxwell, London 2003). For an overview of the Australian position see ch 10 of Luntz, Hambly, Burns, Dietrich & Foster Torts: *Cases and Commentary* (6th ed; LexisNexis Butterworths, 2009) and ch 16 of Balkin & Davis *Law of Torts* (4th ed; LexisNexis Butterworths, 2009).
2. See N Foster "Breach of statutory duty and risk management in occupational health and safety law: New wine in old wineskins?" (2006) 14 *Tort Law Review* 79–104.
3. *O'Connor v SP Bray Ltd* (1937) 56 CLR 464; [1937] ALR 461; (1937) 11 ALJR 29; BC3700027
4. In fact the OH&S Reg does now contain one such provision, in Ch 6B which deals with "Major Hazard Facilities", cl 175E(2). But the option under s 39A has not elsewhere been exercised, so on general principles one would say that all other provisions of the OH&S Reg are arguably civilly actionable, unless there is some good reason to the contrary. This is not, contrary to the concluding words of s 39A, to infer actionability simply from the "failure of the regulations to so provide"; it is simply to recognise that the common law background principles would imply such actionability unless it is clearly excluded.
5. That Parliament is perfectly capable of excluding the implication of civil liability is seen in the provisions of s 32(1), which excludes such liability in relation to the "general duties" provisions of the OH&S Act. Around Australia other Parliaments have chosen not to exclude such liability, with the result that civil actions in relation to workplace injury are regularly based on the head legislation. For examples from Queensland see *Schiliro v Peppercorn Child Care Centres Pty Ltd* [2001] 1 Qd R 518; (2000) Aust Torts Reports 81-563; [2000] QCA 018; BC200000217, *Bourk v Power Serve Pty Ltd* (2008) 175 IR 310; [2008] QCA 225; BC200807055, *Parry v Woolworths Ltd* [2009] QCA 26; BC200900786; in Western Australia see *Minister for Transport v Edgar Enterprises Pty Ltd* [2006] WASC 27; BC200601152 at [568]; for South Australia see the acceptance of actionability by the High Court in *Slivak v Lurgi* (2001) 205 CLR 304; 177 ALR 585; [2001] HCA 6; BC200100264; for Tasmania see *Allen v Western Metals Resources Ltd* [2001] TASSC 19; BC200100704.
6. Clause 34 seems directed, given the terms of cl 34(3), to decisions made in designing premises and before they are made available as a workplace, rather than to the day by day condition of the premises once they are occupied.
7. The courts have reiterated very strongly in recent years the dangers of relying on Parliamentary statements about the meaning of legislation, and the need to give overriding force to what Parliament has actually enacted — see eg *Harrison v Melhem* (2008) 72 NSWLR 380; (2008) Aust Torts Reports 81-951; [2008] NSWCA 67; BC200803962, per Spigelman CJ at [12]; and see the caution concerning the use of Second Reading Speeches expressed by the High Court in *Australian Competition and Consumer Commission (ACCC) v Channel Seven Brisbane Pty Ltd* (2009) 255 ALR 1; 83 ALJR 691; [2009] HCA 19; BC200903238 at eg [33], [72], and [105].
8. It is clear that, s 3(a) of the OH&S Act having referred to the protection of "workers", this clause refers to members of the public and others generally present at a workplace.
9. Under s 8(2) of the OH&S Act. Criminal prosecutions under effectively identical provisions of earlier or related legislation, relating to members of the public, include such cases as *WorkCover v RTA (NSW)* [1994] NSWIRC 109 (concerning children playing on a railway bridge), *Whittaker v Delmina Pty Ltd* (1998) 87 IR 268; [1998] VSC 175; BC9807172 (customers at a horse-riding farm), *Dept of Mineral Resources v Kembla Coal & Coke Pty Ltd* [1999] NSWIRComm 353 (members of the public near a closed mine), and in the UK *R v Board of Trustees of the Science Museum* [1993] 3 All ER 853; [1993] ICR 876; [1993] 1 WLR 1171 (visitors to a museum exposed to the risk of Legionnaire's Disease). At the risk of undue repetition, the fact that Parliament has chosen to exclude civil liability under s 8(2) in the head Act is not inconsistent with (indeed, it arguably supports) the view that such civil liability *is* imposed under the provisions of the Regulations making more explicit the general duties imposed by the Act.

10. Further support for the actionability of the regulations may be found in the interesting fact that obligations of "risk assessment" under provisions of the OH&S Reg such as cl 9(1)(b) are only said to exist in relation to "any other person *legally* at the employer's place of work" (emphasis added.) The exclusion of responsibility for trespassers which this clause seems designed to achieve cannot over-ride the more expansive terms of the Act for the purposes of criminal prosecutions. It seems that the qualifying phrase has been inserted precisely because civil liability in relation to trespassers would otherwise exist (a problem not relevant to the provision in the head Act because it is not civilly actionable).
11. As noted above, in fact it seems to this author that the current situation is perfectly reasonable from a policy perspective when the legislation is given its correct interpretation.
12. *Booksan Pty Ltd v Wehbe* (2006) 14 ANZ Ins Cas 61-678; (2006) Aust Torts Reports 81-830; [2006] NSWCA 3; BC200600677.
13. The closest the judgment of Ipp JA in *Booksan* comes to this is at [167]–[169], where his Honour refers to the policy expressed in the Ipp Report that the limits imposed on civil actions by the recommended reforms should not be able to be avoided by reframing an action for negligence as an action for breach of statutory duty. But while that was indeed a policy outcome recommended by the Ipp Report, that outcome had to be achieved by specific legislative amendments. In the case of the removal of the previous immunity from the defence of contributory negligence afforded to those claiming a statutory action, that was effected, as his Honour noted in *Booksan*, by a complex sequence of amendments to the previous legislation. In the situation of the *Wynn Tressider* litigation, no such specific statutory amendment has been made to exclude civil liability.
14. Note also that Young JA agrees that the judgment of the court on these issues is not binding: see [115]–[116].
15. In the interests of full disclosure it should be noted that in the UK the question whether a member of the public is protected by health and safety regulations was resolved in the negative in *Donaldson v Hays Distribution Services Ltd* [2005] ScotsCS CSIH 48 (and see in England *Ricketts v Torbay County Council* [2003] EWCA Civ 613). But in each of those decision the answer turned on the terms of the actual regulation; whereas here the result seems to be openly reached on policy grounds contrary to the clear language of the statute.