Supreme Court Notes

by Anita Del Medico

NEGLIGENCE - Public authority - Whether common law duty of care exists - Duty to the public at large - Limited duty based on control of a coastal reserve - Whether duty breached - Foreseeability of risk of danger - Effect of policy decisions made by public authority on issues of breach of duty and causation.

Romeo -v- CCNT

25.11.94 Angel J

The plaintiff ("P") was severely injured when she fell approximately 6½ metres on to Casuarina Beach from the top of the Dripstone Cliffs which form part of the Casuarina Coastal Reserve. She was 16 years of age at the time (1987). P alleged that the losses and damages she suffered as a result of her injuries were caused by the CCNT, a public authority statutorily vested with the management and control of the Reserve.

On the evening in question, P had joined some friends for a beach party at Dripstone Cliffs. The only facility provided in this area was a car park, the perimeter of which consisted of low post and log fencing erected by the CCNT. The grass at the top of the cliffs was maintained by the CCNT and plants there were irrigated by it. P consumed two rum & cokes within approximately one hour, after which she had something to eat. P's last conscious memory was of sitting on the timber barrier at one end of the car park, eating some food with a friend. Some of the persons at the party had been located in an area between this barrier and the cliff's edge; P had at one point entered this area herself. The accident occurred at some time after 11.45pm; ambulance officers arrived at 2.07am.

The trial judge found that P and her friend (also injured) had consumed approximately 150mls of rum each on the evening in question. It was further held, given P's age and inexperience with alcohol, the amount of food consumed that evening and the nature of the mishap, and in light of the general findings of an expert witness, that P was adversely affected by alcohol at the relevant time. However it was not possible to say with any accuracy to what degree P's behaviour, concentration and judgement were impaired.

P and her companion had no recollection of the circumstances in which they fell from the cliff. It had been pleaded by P that the cliff was at all material times a concealed danger known to D and/or an unusual danger of which D knew, or ought to have known. It was held that P and her friend had wandered off from the group congregating on the sea-side of the log fence, approximately 3 metres from the cliffs' nearest edge. They did not realise the location of the cliff edge and walked off and over it at the point where there was a gap in the vegetation. Leading to this gap was an area of light-coloured bare earth, naturally created by surface water running off the cliff. In the gloom, it had the deceptive appearance of a footpath; it did not have this appearance in daylight. Nor would it have so appeared to a sober alert person on the night in question. It was found not to have so appeared to the others present on the night.

Counsel for the CCNT argued that no duty of care existed and further, that should a duty be found to exist, there was no breach.

Held, dismissing the action:

(1) A common law duty of care did exist, albeit a limited one. Subject to any question of policy, it is clear from Sutherland Shire Council -v- Heyman (1985) 157 CLR 424 that general principles of negligence apply to public authorities (Mason J @ 457 and Deane J @ 500). Since Australian Safeway Stores Pty Ltd -v- Zaluzna (1987) 162 CLR 479, it is also clear that the liability of an occupier of land to those who enter the land is to be determined by the ordinary principles of negligence. That is, there must be the necessary degree of proximity of relationship. There must be reasonable foreseeability of a real risk of injury to the visitor or to a class of person of which the visitor is a member. The measure of the discharge of the duty is what a reasonable man would, in the circumstances, do by way of response to the reasonable risk. (And see: Gala -v- Preston (1991) 172 CLR 243 @ 252-5; Hackshaw -v- Shaw (1984) 155 CLR 614 @ 633.)

In this case, D was a public authority statutorily vested with control of the coastal reserve, which is managed for the public who come there as of right. Following Dixon J in Aiken -v- Kingborough Corporation (1939) 62 CLR 179 @ 209-10: "The member of the public, entering as of common right is entitled to expect care for his safety measured according to the nature of the premises and of the right of access vested, not in one individual, but in the public at large.... the public authority in control of such premises is under an obligation to take reasonable care to prevent injury to such a person through dangers arising from the state or condition of the premises which are not apparent and are not to be avoided by the exercise of ordinary care." D was under such an obligation on the night of the accident.

Furthermore, this case did not involve P having been induced to rely on D's specific conduct or to rely on D carefully exercising its power to protect P in circumstances where the failure to do so foreseeably would cause damage (see: Sutherland Shire Council -v-Heyman, (supra)). The finding a of common law duty of care in this case did not depend on specific reliance or on some unfulfilled task undertaken, but upon control of the coastal reserve. No specific conduct on D's part in its management of the coastal reserve gave rise to any special duty in the present case. The presence of the cliffs and their physical circumstances were there for all to see in daylight. Their dangers were inherent and self-evident and not created by D, as was the hazard in Arzt -v- City of Darwin (1982) 69 FLR 59. P knew of the presence of the cliffs from her general knowledge of the area and her observations and experience prior to the night in ques-

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tion when going to the beach via the cliff area.

Wilmot -v- State of SA (SA Full Court 23/12/93, unreported).

Nagle -v- Rottnest Island Authority (1993) 177 CLR 423, distinguished.

P's submission that D's establishment of public facilities, and care and maintenance of the cliff-top area gave rise to a duty of care based on general reliance upon D making the area safe for public use, is rejected. Following Aicken (supra), a member of the public entering as of common right to land controlled by a public authority is only entitled to expect care for his safety measured according to the nature of the premises. In this case, and particularly given the scope of D's duty to P, P had the difficulty that any risk of injury reasonably foreseeable to D was equally foreseeable to P and to other members of the public who visited the area.

(2) P's submission that the cliff constituted a concealed danger, or alternatively, an unusual danger, is rejected. It made no difference that the accident occurred at night when visibility was reduced. In the present case, the general presence and danger of the cliffs was apparent and known. No positive act of D created or increased a risk of injury to P. No conduct of D placed it in such a position that the public (including P) relied on it to take care for their safety such that D thereby came under a general duty of care calling for some positive action. The physical features of the natural cliffs were not incongruous with the general character of the area or the use to which it was put by the general public. No reasonable expectations were falsified. The danger of the cliffs could have been avoided by the exercise of ordinary care, which was not exercised by P on the night. Any risk of injury was foreseeable to P, D and the public alike. It follows therefore that there was no breach of duty.

Lipman -v- Clendinnen (1932) 46 CLR 550 @ 566 - 67 (referring to Mersey Docks and Harbour Board -v- Proctor [1923] AC 253, per Lord Sumner @ 274p), followed.

(3) There are matters of policy to be considered in the present case, concerning the CCNT's discretion to decide whether the public safety required further expenditure to be incurred for the erection of signs, the instalment of lights, etc. Policy questions are relevant to the distinction between misfeasance and nonfeasance, which still informs the law of negligence. Any positive act, such as fencing, lighting or the erecting of signs would involve decisions on D's part involving financial, aesthetic and other factors which would in their turn have involved budgetary allocations and allocations of resources. As discussed by Mason J in Heyman (supra), these are policy matters and particular circumstances (such as a concealed danger or an obvious danger to persons exercising reasonable care) aside, a public authority is under no common law duty to take positive action in relation to matters which are dictated by such considerations. In this case, D was under no common law duty to take the positive steps suggested by P. The coastline was 8km in length; there was no basis for identifying this particular spot at the cliff top as a particular hazard as opposed to some other part of the coastline under D's control, such as would require fencing, illumination or sign posting. This is a policy question for the CCNT, not a matter for dictation by a court.

(4) P also fails on the issue of causation. There was no evidence that D's alleged breaches of duty caused her injuries. The provision of fencing, while acting as a barrier, would not have prevented P progressing beyond it. P had in fact passed beyond a barrier fence to enter the area she was in immediately prior to the fall. If there had been a sign or signs or illumination in the vicinity, it cannot be said P would probably have not proceeded as she did beyond the car park fence, on to the cliff top and over the edge. Nor would a log fence closer to the cliff's edge have necessarily prevented the fall. It may have induced people to sit on it or climb it and thus have created a new and additional hazard. P has failed to show a breach of duty by D causative of her injuries.

Action for damages for negligence.

J Waters, instructed by Waters James McCormack, for the plaintiff.

T Pauling QC, with R Webb, instructed by Solicitor for the NT, for the defendant.

The Law Society of the Northern Territory

1995

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