and therefore did not fall within the meaning of the Act. Reading the provisions of the IT Act in light of the Federal Court's decision in *Re McBain: ex parte Australian Catholic Bishops Conference* [2000] 99 FCR 116, VCAT held that the meaning of 'infertile' does not turn on a distinction between social circumstances or clinical diagnosis – it is 'a simple matter for a doctor to be satisfied that the woman was unlikely to become pregnant from an oocyte produced by her and sperm produced by her partner'.[3]

Taking into account the principles considered above, and being satisfied that the proposed treatment procedure to be carried out interstate was indeed permitted by the NHMRC guidelines and laws there, VCAT overturned the Authority's decision and granted permission to YZ to take the sperm to NSW for treatment. In concluding, Morris J said: 'In my opinion, there is every reason to think that [YZ's husband] would now want his sperm to be used to produce children mothered by YZ, if this is the course desired by YZ. Most people who die accept that they cannot, and should not, seek to rule from the grave. Rather they leave ongoing decisions to the living; especially the living they love and respect.'[4] ■

Notes: **1** *YZ v Infertility Treatment Authority* [2005] VCAT 2655. **2** *YZ v Infertility Treatment Authority* at [18], per Morris J. **3** *Ibid* at [45]. **4** *Ibid* at [70].

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The standard of care of the learner driver

Imbree v McNeilly [2008] HCA 40 (28 August 2008)

By Tracey Carver

In *Cook v Cook*,[1] the High Court held that the standard of care owed by a pupil to a driving instructor was that reasonably expected of an 'unqualified and inexperienced driver'[2] or an 'inexperienced driver of ordinary prudence'.[3] Recently, in *Imbree v McNeilly*,[4] the High Court concluded that this principle should no longer be followed.

In overruling its decision in *Cook*,[5] a 6:1 majority of the High Court preferred the view expressed in *Nettleship v Weston*.[6] In that case, the English Court of Appeal concluded that the standard of care owed by an inexperienced driver to a supervising passenger should be the same objective standard of reasonable care as that owed to other passengers and road-users generally.[7]

FACTS

The appellant (Imbree) suffered severe spinal injuries after the first respondent (McNeilly), who was 16 years and 5 months old at the time, overturned the four-wheel-drive station wagon in which he was travelling. McNeilly, although known not to hold a learner's permit and to have little driving experience, was permitted to drive while Imbree sat beside him in the front passenger seat. The accident occurred when McNeilly lost control of the vehicle after swerving off a gravel road to avoid some tyre debris, rather than straddling and driving over it. The second respondent was the vehicle's owner.

DECISION

The fact critical to the reduced standard of care owed by the learner driver to the instructor in *Cook* was the plaintiff's knowledge of the driver's inexperience:[8]

> '[S]pecial and exceptional facts may so transform the relationship between driver and passenger that it would be unreal to regard the relevant relationship as being simply the ordinary one of driver and passenger and unreasonable to measure the standard of skill and care required of the driver by reference to the skill and care that are reasonably to be expected of an experienced and competent driver. ...
>
> [T]he appellant's known incompetence and inexperience as a driver was a controlling element of the relationship of proximity between the parties. That special element of the relationship took it out of the ordinary relationship between a driver and passenger into a special category of relationship between a driver who is known to be quite unskilled and inexperienced and a passenger who has voluntary undertaken to supervise his or her driving efforts.'[9]

However, according to Gummow, Hayne and Kiefel JJ's joint judgment in *Imbree v McNeilly*, translating this knowledge 'into the identification of a separate category or class of relationship governed by a distinct and different duty of care'[10] could no longer be sustained because:

1. It was not argued that a learner driver owes other road-users and passengers a similarly reduced standard of care, even though that plaintiff may also know of the >>

learner's inexperience due to the presence of 'L-plates' or otherwise.

> 'Knowledge of inexperience can thus provide no sufficient foundation for applying different standards of care in deciding whether a learner driver is liable to one passenger rather than another, or in deciding whether that learner driver is liable to a person on the outside of the car rather than one who was seated in the car.'[11]

2. While the standard of care owed is objective, 'describing the relevant comparator as the reasonable "inexperienced" driver does not sufficiently identify the content of the standard that is intended to be conveyed by the use of the word "inexperienced". In particular it leaves undefined what level of competence is to be assumed in such a driver'[12] and consequently gives rise to difficulties in applying the standard.
3. Categorising the plaintiff as the 'instructor' or 'supervisor' of the defendant learner driver does not mean that the plaintiff is in a greater position of control (when compared with another passenger or road-user) such as to warrant a lower standard of care being owed to them by the defendant. Rather:

> 'It must be recognised that there are limits to what supervision or instruction can achieve. There are limits because no amount of supervision or instruction can alter two facts. First, unless the vehicle has been specifically modified to permit dual control, it is the learner driver, not the supervisor or instructor, who operates the vehicle. Second, the skill that is applied in operating the vehicle depends entirely upon the attitude and experience of the learner driver. ... If the conclusion were to be based upon how the supervisor could influence (even direct) the learner driver, it would be based upon considerations that are more appropriately considered in connection with contributory negligence.'[13]

Gleeson CJ also opined that 'the central feature of the relationship between the driver of a car and all the passengers, including the supervisor, is the[ir] vulnerability'.[14]

4. Although there are some cases where the law allows a departure from the ordinary objective standard of the reasonable person, by taking the characteristics of the defendant into account (for example, the reduced standard of care owed by a minor as opposed to an adult),[15] the different level of care in these cases is applied uniformly. This can be distinguished from the principle established in *Cook*, which:

> 'Requires the application of a different standard of care to the one defendant in respect of the one incident yielding the same kind of damage to two different persons, according to whether the plaintiff was supervising the defendant's driving or not.'[16]

The reasoning of the joint judgment was affirmed by Gleeson CJ[17] and Crennan J.[18]

Kirby J,[19] although agreeing that the principle in *Cook* should be overruled, based his conclusion upon the presence of a compulsory scheme of third party motor vehicle insurance across Australia,[20] stating: 'its existence encourages my acceptance of a single universal, objective standard of care owed by all drivers'.[21] In this context, his Honour referred to statements made by Lord Denning in *Nettleship v Weston* that:

> 'Parliament requires every driver to be insured against third party risks. The reason is so that a person injured by a motor car should not be left to bear the loss on his own, but should be compensated out of the insurance fund. ... But the injured person is only able to recover if the driver is liable in law. So the judges see to it that he is liable, unless he can prove care and skill of a high standard.'[22]

Kirby J's reasoning was in contrast to that of Gleeson CJ, who limited any consideration of statutory insurance to something that operated upon – but which was irrelevant to creating – legal liability.[23]

Heydon J[24] held that the issue of liability could be decided without overruling *Cook* as, on either view of the standard of care owed, the defendant's duty of care had been breached. Consequently, as McNeilly's actions had already been found to have breached the lesser standard of an 'inexperienced driver',[25] the High Court agreed that breach of the higher standard of a 'reasonable driver' could also be shown.[26]

CONCLUSION

The High Court's rejection, in *Imbree v McNeilly*, of the relevance of knowledge of a learner driver's inexperience in reducing the standard of care owed by the driver, may lead to a greater emphasis, in future cases, upon a supervising passenger's voluntary assumption of risk or contributory negligence, in order to limit a driver's (or insurance provider's) liability. Indeed, in this case, Imbree was found to be 30 per cent contributorily negligent, in failing to instruct McNeilly to straddle the tyre debris or offer 'basic advice to a learner driver to make no sudden change of direction or speed on a dirt road'.[27] ■

Notes: **1** (1986) 162 CLR 376. **2** *Ibid* at 388, per Mason, Wilson, Deane and Dawson JJ. **3** *Ibid* at 394, per Brennan J. **4** [2008] HCA 40. **5** *Ibid* at [27], [71-2], per Gummow, Hayne and Kiefel JJ; at [13], per Gleeson CJ; at [105], per Kirby J; at [193], per Crennan J; cf Heydon J at [185-91]. **6** [1971] 2 QB 691. **7** See, for example, [2008] HCA 40 at [10], per Gleeson CJ; at [27], [72], per Gummow, Hayne and Kiefel JJ; at [182], per Kirby J. **8** *Ibid* at [47]. **9** *Cook v Cook* (1986) 162 CLR 376 at 383, 388, per Mason, Wilson, Deane and Dawson JJ. **10** [2008] HCA 40 at [50]. **11** *Ibid* at [54]. See also [53] and Gleeson CJ at [4-5], [20]. **12** *Ibid* at [57]. See also [55-6] and Gleeson CJ at [12]. **13** *Ibid* at [66-8]. **14** *Ibid* at [4]. **15** *McHale v Watson* (1966) 115 CLR 199. **16** [2008] HCA 40 at [70]. **17** *Ibid* at [1]. **18** *Ibid* at [193]. **19** Kirby J (at [134-5], [180]) indirectly affirmed the reasoning of the joint judgment by referring to similar considerations listed by Megaw LJ in *Nettleship v Weston* [1971] 2 QB 691 at 707-9. **20** [2008] HCA 40 at [105-12], [130-181]. **21** *Ibid* at [108]. **22** [1971] 2 QB 691 at 699-70. **23** [2008] HCA 40 at [14], [23]. **24** *Ibid* at [185-91]. **25** *Imbree v McNeilly* [2006] NSWSC 680; *McNeilly v Imbree* (2007) 47 MVR 536. **26** [2008] HCA 40 at [24], per Gleeson CJ; at [88], per Gummow, Hayne and Kiefel JJ; at [183], per Kirby J; at [186-92], per Heydon J. **27** *Ibid* at [96].

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