Child drivers, causation and scope of liability in negligence

Zanner v Zanner [2010] NSWCA 343, 15 December 2010

By Tracey Carver

In *Imbree v McNeilly*,[1] the High Court held that the standard of care owed by the driver of a motor vehicle to others should not be reduced on account of the driver's inexperience. Recently, in *Zanner v Zanner*, the NSW Court of Appeal considered *Imbree*'s implications for the driving of a motor vehicle by a minor, shedding further light on the operation of the *Civil Liability Act* 2002 (NSW) provisions regarding factual causation and scope of liability.[2]

FACTS

The respondent (Mrs Zanner), suffered crush injuries and burns after being run over by the first appellant (her 11-year-old son). The accident occurred while the first appellant, under the respondent's direction, was manoeuvring a motor vehicle three to four metres into a carport at the family home. Although the first appellant had successfully driven another car into or out of the carport on four or five previous occasions, on this occasion the boy's foot slipped off the brake and onto the accelerator, propelling the vehicle forward and into his mother, who was standing directly in front of the car. The second appellant was the boy's father and the vehicle's owner. Under s112 of the *Motor Accidents Compensation Act* 1999 (NSW), and for the purpose of Mr Zanner's compulsory third-party insurance, the first appellant was deemed to be driving as his agent.

DECISION

Both at trial[3] and on appeal, liability was denied on grounds that: 'the first appellant did not owe any duty of care to the respondent; if there was a duty of care its scope or content was so limited that there was no breach; if there was a breach it was not the cause of the respondent's injuries; and finally if there was a breach and there was causation the respondent was guilty of contributory negligence to the extent of 100 per cent as permitted by s5S of the *Civil Liability Act* 2002 (NSW)'.[4]

In relation to duty of care and breach, the appellants drew upon *obiter* by Gleeson CJ in *Imbree* to argue that '[t]here may be circumstances in which a person who takes control of a motor car is so lacking in competence that the act of taking control is itself negligent',[5] such that no duty might be owed to one instructing or permitting the act. Nevertheless, both the trial judge and the Court of Appeal (Tobias JA, Allsop P and Young JA concurring) rejected the appellants' submission – 'having distinguished the situation that may have resulted in there being no duty if the first appellant had never driven before, or if the respondent had had no prior experience of her son's driving so that she had no idea of his level of competence...'[6] Accepting that the standard of care owed by a child should be 'attenuated',[7] insofar as it 'was not that which would be expected if he were driving on a public road',[8] it was held that given Mrs Zanner's 'knowledge of his having driven his father's vehicle into or out of the carport without mishap, she was entitled to expect some small degree of driving competence on the part of her son, albeit of a basic and rudimentary kind'.[9] This standard was breached by the first appellant's failure to exercise reasonable care to 'keep his foot on the brake' – an activity the importance of which was not 'beyond the understanding of an 11-year-old'.[10]

On the ground of contributory negligence, while the Court of Appeal increased the trial judge's assessment from 50 to 80 per cent,[11] it held that 'when one evaluates the justice and equity of the situation, it cannot be the case that the respondent was wholly responsible and therefore should bear full legal responsibility for the harm suffered by her',[12] due to her ability to direct her son's conduct. However, it was also 'not open to the primary judge to find that the culpability of each of the first appellant and the respondent was equal.'[13] This was because, while the conduct of the first appellant was due to inadvertence, 'the respondent's departure from the standard of care to which she was subject'[14] involved both permitting an 11-year-old to drive, and 'unnecessarily and inappropriately plac[ing] herself in significant danger, particularly by standing in front of the vehicle'.[15]

The appellants also submitted that they were not liable, as by placing her son 'in control of the vehicle unaccompanied, the respondent created a situation that ought never to have existed.' They therefore argued that, irrespective of contributory negligence, for the purpose of the negligence action's damage element, the respondent ought to be considered to be the sole cause of the accident.[16]

FACTUAL CAUSATION AND SCOPE OF LIABILITY

Confirming the High Court's decision in *Adeels Palace Pty Ltd v Moubarak*[17] that, 'in cases where the *Civil Liability Act* or >>

equivalent statutes are engaged, it is the applicable statutory provision that must be applied',[18] the Court of Appeal held that although not acknowledged at trial, the issue of causation was governed by s5D of the *Civil Liability Act* 2002 (NSW).[19] This section relevantly provides that:

'(1) A determination that negligence caused particular harm comprises the following elements:
(a) that the negligence was a necessary condition of the occurrence of the harm (*factual causation*), and
(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (*scope of liability*).
...
(4) For the purpose of determining the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.'

For the purpose of factual causation, although there were multiple causes of the respondent's injury, Mrs Zanner's own contributory negligence and the negligent driving of her son, the appellants acknowledged that s5D(1)(a) was satisfied, as the common law 'but for' test was satisfied.[20] Furthermore, in terms of positioning multiple causes within the framework provided by s5D in this manner, Allsop P confirmed that:

'...the notion of cause at common law can incorporate "materially contributed to" in a way which would satisfy the "but for" test. Some factors which are only contributing factors can give a positive "but for" answer. Both the driver who goes through the red light and the driver with whom he collides who is not paying attention contribute to the accident. If either episode of neglect had not occurred the accident would not have occurred.'[21]

However, his Honour also opined that when multiple causes combine to cause loss in a way that does not satisfy the 'but for' test, whether each cause makes a sufficiently material contribution to satisfy the requirements of factual causation is to be considered under s5D(2).[22]

In relation to scope of liability, it was submitted that, for the reason described above,[23] 'the application of s5D(1)(b) and (4) to the conduct of the respondent and the first appellant required a finding that it was not appropriate for the scope of the first appellant's liability to extend to the harm caused to the respondent as a consequence of his conduct'.[24] Nevertheless, the court held, as a matter of commonsense and after taking into account relevant policy considerations, that it was indeed appropriate to impose responsibility for the harm on the car's driver.[25] Relevant to this determination, and reflecting statements made by Gleeson CJ in *Imbree* 'concerning the capacity of a motor vehicle to cause harm, and the vulnerability of others on or near the highway',[26] was the:

'matter of policy that dangerous, potentially lethal machines such as motor vehicles must be driven with due care and attention. If they are not and the driver, owing a relevant duty, is found by his breach of that duty to have factually caused the relevant harm, then there was every reason as a matter of policy why he should be held responsible for the harm so caused.'[27]

Consequentially, while the Court of Appeal recognised that 'it would be a rare case indeed where a motor vehicle case attracted some other policy consideration, once factual causation was established, which would justify a denial of liability on the grounds of causation',[28] such a situation may occur 'where the relevant harm is only remotely connected to the defendant's conduct'.[29] Nevertheless, in *Zanner*, '[t]he content of the duty and the attenuated standard of care were directed to the exercise of care to avoid injury to the mother in the very manner that occurred'.[30]

CONCLUSION

The Court of Appeal's decision in *Zanner* therefore provides further useful elucidation of the operation of the *Civil Liability Act*'s causation provisions. It also considers the tension between the extent to which an individual claimant's actions will be considered as a policy factor relevant to scope of liability (and whether a defendant's breach of duty in that sense should continue to be seen as a legally significant cause of the claimant's loss), and the extent to which they should instead be confined to a contributory negligence claim. Indeed, according to Tobias JA, 'it does not follow that because the respondent contributed to her own injuries ... as a matter of policy the first appellant should not be held to account with respect to his own negligence'.[31] However, one should treat the Court's findings as to standard of care with caution. Given the High Court's rejection, in *Imbree*, of the existence of differing standards of care depending upon a claimant's knowledge of a defendant's inexperience,[32] it is unlikely that the same standard of care would have been owed by the first appellant in *Zanner* had he been driving on a public road. Indeed, in the past it has been recognised that a child may remain subject to the standard ordinarily owed by a reasonably competent adult if they engage in an adult activity, such as driving a motor vehicle.[33] ■

Notes: **1** (2008) 236 CLR 510; [2008] HCA 40. **2** *Civil Liability Act* 2002 (NSW) s5D; *Civil Liability Act* 2003 (Qld) s11; *Civil Law (Wrongs) Act* 2002 (ACT) s45; *Civil Liability Act* 1936 (SA) s34; *Civil Liability Act* 2002 (Tas) s13; *Wrongs Act* 1958 (Vic) s51; and *Civil Liability Act* 2002 (WA) s5C. **3** *Zanner v Zanner* (Unreported, New South Wales District Court, Armitage DCJ, 27 November 2009). **4** [2010] NSWCA 343, [16]. See also [17]; *Civil Liability Act* 2003 (Qld) s24; *Wrongs Act* 1954 (Tas) s4; and *Wrongs Act* 1958 (Vic) s63. **5** (2008) 236 CLR 510; [2008] HCA 40, [7] (Gleeson CJ). **6** [2010] NSWCA 343, [35]. See also [44]-[49]. The trial judge also inferred that, as a matter of policy, no duty may have been owed 'if the boy had illegally driven the car on a public street and occasioned injury to the person supervising him': at [37]. **7** *Imbree v McNeilly* (2008) 236 CLR 510; [2008] HCA 40, [69] (Gummow, Hayne and Kiefel JJ); *McHale v Watson* (1966) 115 CLR 199, 213-5 (Kitto J). 'Attenuated' is the word used in the case, signifying that the standard of care found to be owed was less than the traditional standard of the reasonably compentent driver. **8** [2010] NSWCA 343, [50]. See also [34]. **9** *Ibid,* at [54]. See also [31]. **10** *Ibid,* at [60]. See also [61]. **11** *Ibid,* at [103]-[104]. See also [17], [36], [40]-[43]. **12** *Ibid,* at [92]. See generally [84]-[93]. **13** *Ibid,* at [101] (Tobias JA. Allsop P and Young JA agreeing.) **14** *Ibid,* at [99]. **15** *Ibid,* at [100]. See generally [94]-[104]. **16** *Ibid,* at [62], [68]. **17** (2009) 239 CLR 420; [2009] HCA 48. **18** *Ibid,* at [44] (French CJ, Gummow, Hayne, Heydon and Crennan JJ). **19** [2010] NSWCA 343, [63]-[65] (Tobias JA), [2] (Allsop P). **20** *Ibid,* at [66], [81]. **21** *Ibid,* at [11]. **22** *Ibid.* Section 5D(2) provides that: 'In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary

condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.' See also B Madden and T Cockburn, 'Establishing Causation in difficult cases: Can material contribution bridge the gap?' (2011) 105 *Precedent*, p.24. **23** Discussed above at note 16 and accompanying text. **24** [2010] NSWCA 343, [66]. **25** *Ibid*, at [79]-[83]. **26** (2008) 236 CLR 510; [2008] HCA 40, [17]. **27** [2010] NSWCA 343, [69]. See also [80]. **28** *Ibid*, at [80]. **29** *Ibid*. **30** *Ibid*, at [12] (Allsop P). **31** *Ibid*, at [81]. See also [12]. **32** (2008) 236 CLR 510; [2008] HCA 40, [3]-[4], [19]-[20], [53]-[55]. **33** *Tucker v Tucker* [1956] SASR 297; *McHale v Watson* [1966] HCA 13, (1966) 115 CLR 199, 205, 208, 234.

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Slip and fall on school ground

Garzo v Liverpool/Campbelltown Christian School Ltd & Anor [2011] NSWSC 292

By Joshua Dale

In the recent case, *Garzo v Liverpool/Campbelltown Christian School Ltd & Anor*,[1] at issue was the liability of the school and its maintenance contractor to a pedestrian who fell on school grounds.

The plaintiff sued in respect of 'the quite serious' injuries she suffered[2] when she fell walking across a carpark pedestrian crossing. It was raining on the day of injury, albeit only lightly, and it was alleged that unsuitable non-slip paint had been used.

Garling J's comments on the proper way to plead a breach of duty were from the outset interesting. His Honour affirmed that a proper pleading of the *Civil Liability Act* 2002 (NSW), s5B(1)(a), involves the clear articulation of the 'risk of harm', including the allegations made whereby that risk was foreseeable or whether a defendant should have known of such risk.[3] The question to be asked is 'Was the defendant obliged to take precautions?'

In considering CLA s5B(1)(a), his Honour emphasised that the knowledge of the parties concerned, whether actual or constructive, must be determined with the knowledge as at the date of the alleged negligence. His Honour warned of the use of hindsight in determining actual or constructive knowledge, with specific reference to the weight to be placed on expert evidence. Garling J affirmed, "It would be wrong to take into account [the results of expert reports] when considering whether either of the defendants ought to have known of the relevant risk of harm." His Honour had regard to conclusions drawn from expert evidence – in particular, that the pedestrian crossing was 'of a typical kind regularly seen' and that large numbers of people of various ages and motor skills use it – that no issues had been recorded or pleaded.[4] Therefore, no evidence had been presented indicating that the risk of harm was one that the defendants 'ought to have' known about. The risk was not foreseeable so neither the school or the contractor could be negligent.[5] Subsequently, Garling J found that the plaintiff had slipped on a damp painted surface, but otherwise found against the plaintiff on every issue.

Looking to s5B(1)(b), Garling J rejected the submission posed by the plaintiff that the risk of harm was 'not insignificant'.[6] His Honour had regard to factors such as the extensive usage of the crossing from a variety of people of different ages, in varying weather conditions, and the fact that pedestrian crossings are 'commonly encountered in the course of daily life'. His Honour concluded that a pedestrian is capable of 'adjusting their gait' to cope with differences in slippery conditions, and that with no obvious defect to the crossing being identified, the risk was so small that within the meaning of s5B(1)(b) it could not be said to be 'not insignificant'.

His Honour did not accept that there had been any breach of the duty to take 'reasonable precautions' under s5B(1)(c).[7] He preferred evidence that there was adequate friction in the painted surface, preferring the defendant's expert evidence in this regard. It was held that the slip resistance of the pedestrian crossing was satisfactory for a 'normal stride and pace'.[8]

In regards to causation, his Honour found that while the crossing was wet from a light drizzle, there was nothing out of the ordinary about the painted crossing and said that 'except for the exceptional cases determined under s5D(2), it is now well established that factual causation is to be determined by the "but for" test in all cases'.[9]

However, his Honour explored how to prove that a 'particular harm' has been caused by the offending negligence or breach of duty. Garling J said that in order to establish factual causation under CLA s5D(1)(a), a plaintiff would need to establish that a breach of duty 'was a necessary condition' in the cause of any physical injuries. His Honour pondered the idea that if the crossing was 'very slippery',[10] then it would be possible to find that if the friction of the paint was inadequately low, in those circumstances it could have played a role in the cause of the fall. However, he could not reconcile that view with the other evidence in this case. >>