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Crikey - kangaroo chaos!

Was the risk of colliding with a 'roo obvious and should the Council have paid big bucks to erect a 'roo proof airport fence?

Kempsey Shire Council v Five Star Medical Centre Pty Ltd [2018] NSWCA 308

Key Points & Implications

- This case is an example of how public authorities can successfully rely upon Section 42 of the *Civil Liability Act* to avoid liability in circumstances where there are budgetary and resourcing constraints.
- The argument that a risk is obvious should be properly advanced at first instance, by collecting and presenting all evidence relevant to the risk. This includes obtaining evidence of the plaintiff's knowledge and appreciation of the risk at the relevant time, and properly categorising and assessing the risk.

Facts & District Court Decision

- On 25 February 2014, Dr Alterator (the Pilot), the directing mind of Five Star Medical Centre (the respondent), flew an aircraft from Port Macquarie to Kempsey Aerodrome. Upon landing, the aircraft collided with a kangaroo.
- Five Star Medical brought proceedings in negligence against Kempsey Shire Council for the costs of repairing the aircraft.
- The primary judge held that the Council breached its duty of care to users of the aerodrome by:

  (a) not issuing a notice to airmen (NOTAM) stating that kangaroo incursions onto the aerodrome had increased to dangerous levels; and

  (b) not erecting a kangaroo-proof fence around the aerodrome.

- At the time of the accident, Dr Alterator was aware of a warning published by Air Services Australia (ASA) in the *En Route Supplement Australia* ("ERSA") Notice for Kempsey Aerodrome, reading "1. Kangaroo hazard exists".

Issues on Appeal

- With respect to (a) whether the alleged breach was a failure to warn of an obvious risk, so that liability was precluded by s5H of the *Civil Liability Act 2002* (NSW) ("CLA");

- With respect to (b) whether Council could avoid liability pursuant to s42(b) of the CLA.

Court of Appeal decision: Basten JA, McColl JA agreeing (Simpson AJA dissenting):

(a) Duty to warn: whether kangaroo hazard was an "obvious risk"

- There is no duty to warn of an "obvious risk" under the CLA. Basten JA commented that the test is an objective one and the risk should be assessed at a reasonable level of generality.
- The Court of Appeal held that the risk was obvious and therefore no notice was required to be given by the Council to the pilot.
- The risk was characterized as "*the risk of an aircraft suffering damage through colliding with a kangaroo or other wildlife on the runway as the aircraft was landing or taking off*" [14]. Framed in this way, it did not matter whether the pilot had not seen a kangaroo on the previous 20 occasions that he had flown the same route. He knew there was a risk.
- Even though the warning provided by the ERSA was inadequate, there was no duty on the Council to provide **any** such warning as the risk was obvious within the meaning of S5H CLA. Therefore, it was not necessary to evaluate the reasonableness of such warning.
- Although the Court of Appeal held that there was an obvious risk which was accepted by the pilot when he flew into the aerodrome, had there been evidence of an increased number of kangaroos in the area at the time of the accident, then this may have resulted in the risk being greater than the obvious risk of which the pilot knew about, and the Council may have owed a duty to warn of the increased risk of a collision.
- Simpson AJA dissented on the basis that S5H(2)(a) CLA provided an exception to the obvious risk provisions because the pilot requested advice or information about the risk from the Council, albeit indirectly through a third party website (ASA).
- Basten JA did not consider that the exception applied as the pilot obtained information from ASA, and not the Council, even though ASA used information provided by the Council (and other sources) as the basis for information published on its website.
- Simpson AJA also distinguished between a "failure to warn" case and a "failure to provide information case" [110-111], and held that the Council had an obligation to provide such information.

(b) Fencing the airport and Section 42 CLA (Per Basten JA, McColl JA and Simpson AJA agreeing)

- In determining whether the Council owes or breached its duty of care, Section 42 CLA sets out that the Court is to consider the financial resources available to the Council.
- There was evidence that the Council was aware that existing fencing did not adequately prevent kangaroos and stock from gaining access to the airport and reported obtained suggested the only way to stop wildlife intrusions was to install adequate fencing. However, due to budgetary constraints no fence was erected. The cost of a fence was estimated to be approximately $210,000. Council's evidence was that the fence would not have been a foolproof solution in any event.
- The Court of Appeal considered that erecting a fence as a precaution would have cost a significant amount of money and was not a reasonable precaution for the Council to take. "*The proper operation of the principle in s 42(b) is that, at least in the circumstances of this case, the Court should not find a breach of duty by failure to take a precaution in circumstances where a decision to take the precaution required an assessment of conflicting demands on the Council's budget*." [64].

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