IN THE COURT OF APPEAL [1998] QCA 419

SUPREME COURT OF QUEENSLAND

Appeal No. 5199 of 1998

Brisbane

[Heil v. Suncoast Fitness]

BETWEEN:

LESLIE JOHN HEIL
(Plaintiff) Appellant

AND:

SUNCOAST FITNESS (A FIRM)
(Defendant) Respondent

McMurdo P.
Pincus J.A.
Williams J.

Judgment delivered 15 December 1998

Joint reasons for judgment of McMurdo P. and Pincus J.A., separate reasons of Williams J. concurring as to the orders made.

APPEAL DISMISSED WITH COSTS

CATCHWORDS: **PERSONAL INJURY - appellant injured when hit by bicycle when power walking with a group - respondent's employee was leader of the group of power walkers - whether unreasonable for leader to fail to express to walkers a view as to what might be done to lessen the prospect of being injured by a bicycle rider - whether civil cause of action arises for breach of s. 10 *Workplace Health and Safety Act* 1989.**

***Workplace Health and Safety Act* 1989 s. 10**

Counsel: Mr M Grant-Taylor for the appellant.
Mr D North S.C. with him Mr P Gray for the respondent.

Solicitors: Boyce Garrick for the appellant.
Phillips Fox for the respondent.

Hearing Date: 10 November 1998.

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JOINT REASONS FOR JUDGMENT - McMURDO P. AND PINCUS J.A.

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1 The appellant failed in an action for damages for personal injuries in the District Court. He had been walking along a path frequented by walkers, joggers, bike riders and rollerbladers, when a man riding a bicycle ran into the appellant and injured him. Damages were agreed at $35,791.30; liability was disputed.

2 The appellant's action was not against the rider of the bicycle which struck him, but against the employer of a woman who is referred to by her given name, Gay, in the reasons of the primary judge and in these reasons. She was at the time of the appellant's injuries the leader of a group of power walkers which included the appellant. Gay's employer was sued on the basis that the injury the appellant suffered when struck by the bicycle was Gay's fault; it was pleaded against the respondent employer that Gay

had failed to keep a proper lookout and matters of that sort. In addition to a claim in negligence, the appellant based his case on a statute whose primary purpose appears to be to protect employees from injury at their places of work, the *Workplace Health and Safety Act* 1989. Having failed below, the appellant raises both contentions again, in this Court: that he is entitled to succeed either under the general law or under the statute, as for breach of statutory duty.

3 The appellant was at the time when he was injured, on 6 January 1995, a man nearly 60 years of age and was a customer of a fitness centre run by the respondent, at Maroochydore. The fitness centre provided, amongst other activities, organised walks in the locality and it was while participating in one of these that the appellant sustained his injury. He had gone on similar walks for some months prior to being injured and a considerable number of those were on the same route as that which was followed on the relevant date. The appellant was walking in a group of 4 people; Gay was in front walking with one person and the appellant and another person were walking behind those two. The appellant was on the right hand side of the path, which was about a metre wide and bitumen surfaced. To the right of the path was a grassed area bounded by a fence consisting of one rail supported on posts, beyond which the land fell away to the sea; the distance between the path and the rail was between .75 metres and 1 metre. To the left of the path was a large mown grass area. The photographs which are in evidence show an even path with no sharp changes of grade or direction, presenting no evident danger.

4 When the bicycle struck the appellant, the group was walking up an incline and was about 20 metres from its crest. The judge found that:

> "A cyclist came over the crest travelling south, elected to go to the plaintiff's right where manoeuvrability was tight and in doing so collided with the plaintiff's right shoulder . . .
> The plaintiff did not see the cyclist until an instant before the collision when Gay and the person with her moved aside. He received no warning of the bikes approach. Gay and the person with her may have blocked the plaintiff's view of the oncoming cyclist".

On the face of it nothing particularly points to the conclusion that the appellant's injury was due to anything Gay did or failed to do. The cyclist's apparently reckless conduct seems to have been the problem. It was described by the appellant in a letter dated shortly after he was injured as follows:

> "Cyclists are required to give way to pedestrians. We were approaching the crest of a hill at Alexandra Headland. I was in a line of two or three . . . a cyclist travelling down hill from the crest at excessive speed scattered our group. I happened to be in a line at the back of the group and didn't see the cyclist until a split second before he connected with me".

In that letter the appellant did not seek to blame Gay, describing her as a person who "always takes exceptional care of the group for which she is responsible".

5 Various submissions were made to the primary judge as to the basis on which it might be held that negligence on Gay's part caused the injury and they were all rejected. Mr Grant-Taylor argued for the appellant in this Court that there was a culpable absence of instructions, submitting that Gay should have told the appellant to remove himself from the path on his approach to the crest, or to fall back further behind the pair in front of him, or to walk in single file on the left. These instructions would tend to protect against the danger from a cyclist coming from the direction opposite to that of the walkers rather than from the danger, which one might think to be more obvious, of being struck by a cyclist approaching fast from behind the walkers.

6 In our view, none of these suggestions is convincing as support for the conclusion that Gay was at fault. Mr Grant-Taylor points out that there was uncontested evidence that the appellant would have obeyed such instructions. But there was nothing, in our opinion, in the situation at the relevant time which made it unreasonable for the leader of the small group, Gay, to fail to express to her companions a view as to what might be done to lessen the prospect of being injured by a bicycle rider, sharing the path. In Wyong Shire Council v. Shirt (1980) 146 C.L.R. 40, one finds in the leading judgment, that of Mason J.:

> "In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk". (47)

Then in Nagle v. Rottnest Island Authority (1993) 177 C.L.R. 423, the ultimate question was framed in similar terms:

> "**. . .** the giving of a warning that the ledge was unsafe for diving was the action that a reasonable person in the respondent's situation would have taken to guard against the foreseeable risk of injury which existed". (431)

So the question in the present case becomes, was Gay's not having given advice to the appellant, to lessen the risk that he might be injured by a careless bicycle rider, an omission that a reasonable person would not have made? Was it an unreasonable omission? As both the High Court cases reaffirm, it is against the standard of the

conduct which one would expect of a reasonable person that Gay's omission must be judged. It is not enough to conclude that a very fussy or apprehensive person would have taken the suggested precautions. Adherence to this standard is important, both to avoid the injustice which may ensue if defendants are held guilty of negligence for having behaved in just the way most reasonable people would have behaved, and to avoid giving a judgment which seems to be founded on succumbing to the temptation of satisfying an impulse to be charitable, by use of money which is not the judge's. In the present case it may be conceded that some people might, anticipating the approach of a careless bicycle rider, have gone into single file or got off the path, but it cannot sensibly be said that not doing these things merits the description unreasonable, or the description of not doing what a reasonable person would have done. The expectation of a walker on such a path would ordinarily be that cyclists would take at least some sort of care to avoid endangering them; few people would, when walking as the appellant and Gay were, proceed always on the assumption that a cyclist might ride so as to "scatter" (as the appellant's letter put it) a group of walkers. In our opinion the judge was right to hold that Gay was guilty of no breach of her common law duty of care towards the appellant.

7 The action based on the statute raises a more difficult problem.

8 The appellant relied, below and in this Court, on the provisions of s. 10 of the *Workplace Health and Safety Act* 1989, a statute which was repealed a few months after the appellant suffered his injury: see s. 206 of the *Workplace Health and Safety Act* 1995. Section 10 of the 1989 Act reads as follows:

"(1) An employer who fails to conduct his or her undertaking in such a

> manner as to ensure that his or her own health and safety and the health and safety of persons not in the employer's employment and members of the public who may be affected are not exposed to risks arising from the conduct of the employer's undertaking, except where it is not practicable for the employer to do so, commits an offence against this Act.
>
> (2) A self-employed person who fails to ensure that persons not in his or her employment and members of the public are not exposed to risks to their health or safety because of the work in which the self-employed person or any of his or her employees is engaged, except where it is not practicable for the self-employed person so to do, commits an offence against this Act."

The appellant argues that the respondent is liable civilly for having failed to conduct its undertaking in such a manner as to ensure that the appellant was not "exposed to risks arising from the conduct of the employer's undertaking". It is not in dispute that the respondent was at material times an "employer" within the meaning of s. 10; the appellant is within the categories of "persons not in the employer's employment and members of the public" - a category that seems to include every person, except the respondent's employees.

9 The primary judge, for reasons that his Honour gave, reached the conclusion that s. 10 of the Act gives no private right of action for its breach; accordingly, it was held that this ground of liability put forward by the appellant was rejected. This conclusion is challenged by the appellant, relying principally upon the decision of this Court in Rogers v. Brambles Australia Ltd [1998] 1 Qd.R. 212, in which it was held, the point being conceded, that breach of s. 9(1) of the same Act gives rise to a civil cause of action.

10 The task of determining whether it should be inferred "on a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state

of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation" (Sovar v. Henry Lane Pty Limited (1967) 116 C.L.R. 397 at 405), that an action for breach of statutory duty exists is made more difficult by the absence of any precise test. Two recurrent themes, however, are that courts may be more free to discern that an offence-creating statute also gives rise to a civil cause of action where it prescribes a specific precaution for the safety of others (O'Connor v. S P Bray Limited (1937) 56 C.L.R. 464 at 477, 478, John Pfeiffer Pty Ltd v. Canny (1981) 148 C.L.R. 218 at 243, Byrne v. Australian Airlines Limited (1995) 185 C.L.R. 410 at 424) and, perhaps, that the Court may be more ready to decide such a point in favour of a plaintiff where the statute seems to have been passed for the benefit of a class or section of the public: Phillips v. Britannia Hygienic Laundry Co. Ltd [1923] 2 K.B. 832 at 840, Byrne v. Australian Airlines Limited (above) at 424. In so far as these criteria give any guidance they tend to point against the appellant's argument; the duty created by s. 10 is perfectly general, not specific, and if the appellant's argument is accepted it is a duty owed to all persons whatever, not to a category of persons.

11 Further assistance in solving the problem is in our view to be gained by considering s. 10 in the context of other comparable provisions of the same Act. Section 10(1), it will have been noted, creates an obligation on an employer in favour of all other persons, subject only to the condition that they "may be affected"; this is not in truth a relevant limitation, because no unaffected persons would have any cause of action. It will also be noted that s. 10 is designed for the protection of the employer himself or herself (as well as others) and that it also catches self-employed persons. Section 11(1) creates an obligation to ensure that workplaces are safe; unlike s. 10 it does not say to

whom the obligation is owed. The rest of s. 11 is ancillary or complementary to s. 11(1). Section 12 creates offences which may be committed by persons having responsibility for the presence at workplaces of plant and substances for use at such places. Section 13 makes it an offence for employees to (putting it simply) act dangerously at workplaces, and s. 14 creates a similar offence in relation to persons other than employers and employees.

12 Summarising the whole of ss. 9 to 14, all create offences relating to workplace dangers; speaking generally, the offences are not so defined as to imply an obligation to do or refrain from doing anything specific, but, rather, they require the potential offenders to act safely. Speaking generally - s. 9 is a clear exception - the provisions are not so phrased as to indicate an intention to protect a particular class of persons; rather, they appear to be for the protection of anyone, whether employee or not, whose safety may be put at risk by the activities dealt with by the various sections.

13 In favour of the appellant's contention it has to be said that the view, accepted in Rogers v. Brambles Australia Ltd (above), that breach of s. 9(1) which makes it an offence for an employer to fail to "ensure the heath and safety at work of all the employer's employees", with a certain exception, tends to suggest that an analogous conclusion should be reached, with respect to s. 10 and perhaps ss. 11 to 14 also. A consideration tending in the other direction is that already referred to, the lack of any limitation on the category of persons to whom the duties implicit in ss. 10 to 14 are owed; those duties would appear to be owed to any person who is or might be affected by breach of them.

14 Looking at the matter more broadly, there is a degree of improbability about the proposition that this group of sections were intended by the legislature to create a civil cause of action. The improbability is less with respect to s. 9, if only because "courts think that industrial safety legislation ought to give rise to actions": Trindade and Cane "The Law of Torts in Australia", 2nd Ed. Oxford University Press, 1993, p. 668; see also Balkin and Davis "Law of Torts", 2nd Ed. Butterworths, 1996, p. 500. Having regard to the state of the law when the statute was passed, it would hardly have been a matter for surprise that a provision so expressed as to show an intention to protect employees, specifically, should have been held to give rise to a right of civil action; rights of action based on statutory duty to employees, whether logically or otherwise, appear to be in a special category.

15 Another factor which appears to tend against the appellant's argument with respect to s. 10(1) is that the offence it creates depends on proof of mere exposure to risk; had it been intended to create a right of civil action, one might have expected there to be some reference to prevention of injury or damage.

16 Considerations of policy arise; one arises from the fact that s. 10 is not confined in its operation to the workplace, but applies to the whole undertaking, as is illustrated by the present case. If there were a collision between two vehicles, one being driven in the course of an undertaking caught by s. 10 and one not, it would seem absurd that different tests should be applied, in determining the liability of the two drivers. And there is no reason to think that the general law provides inadequate safeguards, by way of imposition of civil liability, to members of the public put at risk by undertakings or work mentioned in s. 10.

17 We agree with the primary judge's conclusion that s. 10(1) does not create any civil cause of action.

18 The appeal is dismissed with costs.

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REASONS FOR JUDGMENT - WILLIAMS J

Judgment delivered 15 December 1998

1 I have had the advantage of reading the joint reasons for judgment prepared by McMurdo P and Pincus JA and I agree with what has been said therein, and with the conclusions reached. I only wish to add two brief observations of my own.

2 Firstly, with respect to the common law claim, it was not suggested that Gay had any greater skill, expertise or experience than the appellant when it came to assessing a situation of possible danger whilst walking through the park and deciding what step

should be taken to minimise the risk. Further, it could not be said that, given the nature of the activity involved, Gay was a person in authority so far as the appellant was concerned. Whether the appellant walked on the grass or the cement path, and whether he walked two feet or six feet behind the person in front, were decisions that he was just as capable of making as Gay. The appellant was in just as good a position as Gay to appreciate any possible risks associated with the undertaking in question, and equally capable of taking such steps as were necessary to minimise those risks.

3 Secondly, so far as s.10 of the Workplace Health & Safety Act 1989 is concerned, it is difficult to see how it could be made to apply to the factual situation under consideration. The section speaks of an employer being obliged to conduct "his undertaking" in such a way as to ensure that persons "are not exposed to risks arising from the conduct" of that undertaking. Here the undertaking involved organising people to walk through a public park. People walk through public parks every day - it is an extremely common occurrence in our society. There is always a risk that a user of a public park might act negligently so that some injury is caused to another of the users of the park. I have difficulty in comprehending how an employer in the position of the respondent here could be said to be exposing those participating in one of its organised walks to a risk arising from the "conduct of the undertaking" where the only exposure was to the ordinary risks to which every user of a park is exposed, and with respect to which every user is capable of taking avoidance measures.

4 As said previously, I agree with the orders proposed.